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IN THE

Supreme Court of the United States

October Term 1954.

No. [redacted] 70

DAVID SWIDLER, *Petitioner*,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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No. .

DAVID SWIDLER, *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit sustaining his conviction under Section 145(b) of the Internal Revenue Code.

OPINION BELOW.

The per curiam Opinion of the Court of Appeals (App. pp. 27-28) is not yet reported. There was no written opinion in support of the judgment of the District Court.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 22, 1955. A petition for rehearing was denied on April 15, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

Petitioner was convicted for income tax evasion under Section 145(b) of the Internal Revenue Code. The case was tried on a cash receipts and partial expenditures theory. The Government attempted to prove that the petitioner engaged in certain transactions in piece goods which resulted in net income to him which he did not report as such.

The questions presented are:

1. Whether a conviction can be sustained where the Government's evidence shows expenditures by the defendant for merchandise in excess of the gross income charged to him?

2. Whether a conviction can be sustained under this theory where the only evidence of the cash receipts con-

sists of testimony by a Government witness who stated that the petitioner turned the cash over to someone else in her presence?

3. Whether the trial judge's charge to the jury must contain a statement of the petitioner's theory of defense even if developed solely by cross-examination?

4. Whether the cumulative effect of rulings on evidence and comments and conduct by the trial judge was such as to prejudice the petitioner and deprive the petitioner of due process and his right to a fair trial by jury?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The Fifth Amendment provides, *inter alia*, that—No person * * * shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; * * *

2. The Sixth Amendment provides, *inter alia*, that—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * *

3. The Sixteenth Amendment provides, *inter alia*, that—The Congress shall have power to lay and collect taxes on incomes from whatever source derived * * *

4. Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * * * * *

(b) Failure to Collect and Pay Over Tax, or Attempt

to Defeat or Evade Tax.—Any person * * * and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

STATEMENT.

Petitioner was indicted on March 6, 1952 in the United States District Court for the Eastern District of Pennsylvania on one count for willfully and knowingly attempting to defeat and evade income taxes, in violation of Section 145(b) of the Internal Revenue Code (R. 2a).

Petitioner was first tried and convicted on June 3, 1952. On December 4, 1952 the District Judge granted a new trial "in the interests of justice" (R. 1a), and at the same time denied a motion for judgment of acquittal. Petitioner appealed to the Court of Appeals from the denial of his motion for judgment for acquittal, which appeal was dismissed for want of jurisdiction: *United States v. Swidler*, 207 F. 2d 47. A petition for writ of certiorari was denied by this Court: 346 U. S. 915.

Petitioner again went to trial on September 28, 1954, before the same trial judge who presided at the first trial, but with different counsel. The theory of the prosecution was that the petitioner, who was engaged with other partners, in the business of manufacturing maternity clothes in Philadelphia on a small scale under the name "Mother Craft", engaged in certain transactions in piece goods during the year 1945 which did not appear on the partnership

business books and records and which resulted in net income to him which he did not report as such.

The Government introduced the testimony of Samuel M. Cohen, who testified that during the year 1945 he purchased rayon and crepe piece goods from two New York mills with his "priority." Cohen ordered these goods under the name of his company, Bridgeport Luggage Company; but paid the invoices with money received from the petitioner; and under the name "J. Levenson," forwarded the goods for shipment to various purchasers (R. 3a, 7a, 15a).

Cohen testified that he had been in the luggage business for about twenty-three years and that he had a government priority permit which enabled him to buy this merchandise (25a, 49a). Cohen stated that the cost price of these goods from the mills was about thirty cents a yard, and that he knew at the time that they had a market value of seventy-five cents to one dollar a yard (26a, 27a, 56a); and that the petitioner could not have bought the goods without his, Cohen's, priority (28a, 54a). Mr. Cohen stated emphatically, on at least four occasions during his testimony, that he, Cohen, "made no money" out of these transactions (41a, 46a, 47a, 54a, 55a).

On cross-examination, Cohen admitted that in 1942 he and his wife went into bankruptcy with only $25 and two small insurance policies in assets, but that in 1946, when he incorporated his business, he bought out his partner's share of the business, which had a net worth of some $50,000, increased the capital stock of the corporation by $20,000, and also loaned the corporation $32,000 (35a-37a). When asked where he secured the money to enable him to do these things, the witness replied that he had "borrowed it from his friends" (38a).

The following question was asked: "Would you tell the Court and jury how much money you are claiming from the Government at this time?" An objection to this question by the Government was sustained (R. 43a).

Samuel Einhorn testified that he was in the dress busi-

ness in Philadelphia and that he purchased fabrics from the defendant on several occasions in 1945 (86a). He was asked by the prosecutor, "By what name" did he know the defendant. Mr. Einhorn replied that he knew him as "David Swidler," and that he was a manufacturer of Mother Craft (86a). He stated that these goods were invoiced to him in the names of J. Levenson and Charles Schwartz, and that he paid for the goods by checks made out to Levenson and Schwartz (89a).

He stated that the defendant never pretended to be anybody else but Mr. Swidler. He further stated that he told the Government Agent, when he was asked who Charles Schwartz and J. Levenson were, "That is the people who I understand he made the purchases from for us" (88a). He further stated that the reason that he did not buy merchandise from Pacific Mills, although he had been in business for twenty years, was because he couldn't get it (90a).

Sol Lavin, a certified public accountant, testified that he prepared the defendant's personal income tax returns for 1945 and 1946, as well as the partnership returns for the Mother Craft partnership (107a); that he made out the partnership return for the fiscal period January 1, 1945 to May 15, 1945; that the defendant's distributive share of income for that period was $5,101.47, and that this amount was reported by the defendant as personal income for the calendar year 1945 (108a, 109a). Lavin further stated that the partnership was re-formed as of May 15, 1945; that the partnership return for the fiscal period May 16, 1945 to January 31, 1946 showed that the defendant's distributive share of income for that period was $9,012.47, and that this amount was reported by the defendant as personal income for the year 1946; that, in addition, the defendant had approximately $1800 in income from another partnership, or a total reported income of $10,891.30 (109a). Thereafter, the partnership books were kept on a fiscal year ending January 31st (117a).

Lavin testified that the Mother Craft books and records showed purchases by the partnership from Levenson and Schwartz, accounts payable to Levenson and Schwartz, and cancelled checks showing payments to Levenson and Schwartz (110a, 111a). Lavin testified that at the time of the reforming of the partnership on May 16, 1945 it was necessary for the defendant to assign $10,000 worth of accounts receivable in order to get a bank loan of $4,498.01 to operate the business (122a), and that the new partnership had an outstanding obligation of $12,908 at its inception to the old partners who had sold their interests (126a).

Sidney Goldblatt, a handwriting expert employed by the Treasury Department, testified that in his opinion the endorsements "Charles Schwartz" on the back of the checks were written in a disguised hand (141a). However, Mr. Goldblatt stated, both on direct examination and on cross-examination, that after a thorough analysis of the defendant's handwriting he could not say that these endorsements were written by the defendant (145a, 146a).

The Government attempting to prove that Levenson and Schwartz were non-existent people, and that the defendant cashed the checks made out to these names and kept the money, called Mrs. Charlotte Mintz, who operated a check cashing service in New York City, as a witness.

Mrs. Charlotte Mintz testified that in the year 1945 the defendant had been recommended to her by somebody she relied on a great deal (151a); that the person who recommended the defendant "said he would be responsible for anything I did in the matter" (160a); that the defendant would come to her place of business with one or two other men ("always there were two people, two or three people") (151a); that one of the other men was introduced to her as J. Levenson (153a); that they would present checks in large denominations to her endorsed with the names "Charles Schwartz" or "J. Levenson"; and that she would cash these checks (151a, 154a).

Mrs. Mintz testified that on some occasions the Levenson and Schwartz checks were presented to her by other people,

without the defendant being present at all (157a); and that, on those occasions when the defendant was present she wasn't sure *who* picked up the cash each time, but that when the defendant picked it up he would hand it to the other man present (158a).

Mrs. Mintz testified that on no occasion did the defendant represent himself to her as Levenson or Schwartz (157a); that during that same period she cashed personal checks for the defendant in the amounts of $29.60, $58.60 and $34.45; and that these checks were endorsed "David Swidler" (154a, 157a).

Daniel B. Shipley, a Special Agent of the Internal Revenue service, who investigated the defendant, testified that he went to his place of business and that he asked the defendant whether he knew Levenson and Schwartz. The Agent stated that the defendant told them he did; that he bought goods from Levenson but that he only dealt with Levenson, and that when he bought goods from Schwartz it was only through Levenson.

Mr. Shipley testified that he made the field investigation with regard to the defendant's income tax liability for the year 1945 (168a). Mr. Shipley testified that as part of his investigation he traced certain shipments of piece goods which had been sold on invoices from Levenson and Schwartz from their point of origin at the mills, through Bridgeport Luggage Company, to the ultimate purchasers (172a). Mr. Shipley testified that the total sales of such merchandise, as to which he could pinpoint the origin and cost price of the material and its ultimate destination and selling price, amounted to $107,927.08; and that the net profit on these transactions was $74,313.01 (169a).

On cross-examination, Mr. Shipley stated that in the course of examining the Mother Craft books and records he found that the defendant also purchased merchandise from Schwartz and Levenson for the partnership; that this merchandise was billed to the defendant at slightly above the mill price; and that the defendant paid for these goods by Mother Craft checks (174a, 176a). Mr. Shipley stated

further that during the course of the investigation the defendant told him that in 1945 he sold piece goods on behalf of Levenson and Schwartz in order to be able to get merchandise to operate his own business; that in payment for his services in this respect he was given merchandise for his own use at a reduced price (177a); and that he, the defendant, did not receive any money out of any of the checks made out to Levenson and Schwartz (176a, 181a, 182a).

Herman Bell, an Internal Revenue Agent, was called to the witness stand. He was asked by the prosecutor what the net income would be if a man makes certain sales of merchandise for $107,927.08 which cost $33,641.07. The court answered this question by stating what the amount would be, namely, $74,313.01. The Agent testified that there would be a tax liability in the amount of $46,698.14.

In response to a question by the court, which the court described as "just an assumption that has no bearing," "If the $107,927.08 were cut in half as far as income was concerned, which would amount to $53,963.54, and the goods cost the same, $33,614.07, which is a differential of $20,349.47, would that result in a tax liability?", the Agent replied that it would and stated that the tax liability would be $9,954.58 (192a).

During the course of the trial the judge stated that if he were called upon to make an observation at the conclusion of the case, "it won't be in fairness to the defendant" (R. 186a).

The judge interrupted petitioner's counsel's closing address to the jury and inferred that he had misstated a vital piece of evidence, then sent the jury out for a ten minute recess (R. 195a-199a).

In his charge to the jury the judge undertook to outline the evidence and theory presented by the Government to show the petitioner's guilt but did not charge the jury as to the nature of the petitioner's theory of the case. No exception was taken to the charge (R. 200a-206a).

At the conclusion of the trial the petitioner was found

guilty and was sentenced to ten months imprisonment and a fine of $5,000 (R. 1a). The judgment was affirmed by the Court of Appeals in a *per curiam* opinion (App. pp. 28-29).

REASONS FOR GRANTING WRIT.

1-A. In *Holland v. United States*, 348 U. S. 121; *Friedberg v. United States*, 348 U. S. 142; *Smith v. United States*, 348 U. S. 147 and *United States v. Calderon*, 348 U. S. 160, this Court undertook a thorough consideration of the application of the net worth method in the prosecution of violations of Section 145(b). The treatment afforded the petitioner in the instant case would seem to indicate that a review of methods of prosecution under other theories of tax liability is in order at this time.

This is not a "net worth" or "expenditures" case. The Government did not introduce any evidence to the effect that the petitioner's net worth increased in 1945 in an amount greater than he reported his income, nor was there any evidence introduced by the Government that the petitioner's expenditures exceeded his declared resources. The Government attempted to prove its case on the theory that in the year 1945 the petitioner received large sums of cash, representing profits from the sales of merchandise which he did not report as income. And yet, with the exception of one check, which was endorsed by the petitioner and his wife, and which, it was stipulated, was deposited in their joint bank account (129a, 160a) (Ex. G-48), there is not one scintilla of evidence that the petitioner received any cash out of the checks which were given in payment for the goods which were sold.

With regard to the petitioner, Mrs. Mintz, who operated the Mintz check cashing service, testified that he was present on some but not all of the occasions when the checks were cashed; that whenever he was present there was someone else with him (152a, 157a); and that one of these other

persons was introduced to her as a J. Levenson. Mrs. Mintz stated that her usual procedure in cashing checks was to count out the cash and put it down; that she wasn't sure who took it all the time; but that whenever the petitioner picked it up he would hand it to the other man that was present (158a). Mrs. Mintz also testified that during the same period that she was cashing Levenson and Schwartz checks in the amounts ranging from $1200 to $18,000, she was cashing personal checks for the petitioner endorsed with his own name in amounts ranging from $29.60 to $58.50 (156a, 157a). It is obvious that the petitioner cannot be charged with the receipt of income from the Levenson and Schwartz checks unless it can be shown that he received the proceeds of the checks. And yet, the cash proceeds of these checks were charged as income in computing the tax liability of the petitioner in this criminal prosecution.

It is clear and well settled that one who is engaged in the sale of merchandise and merely acts as a conduit or transmitting agent for the proceeds of the sale cannot be charged with the receipt of the income from the sales merely by virtue of having handled the money during the course of transactions; *Thomas v. Perkins*, 301 U. S. 665 (1937); *Mertens, Law of Federal Income Taxation*, Sec. 17.11, 17.12. The part played by petitioner in these transactions is quite clear, as evidenced by the testimony of the special agent. During the course of the investigation of his income tax liability, the petitioner repeatedly told the agent that he did not make any money out of any of the checks made out to Levenson and Schwartz; and that he was selling the merchandise on their behalf and not on his own. The evidence appears in the record in at least four different places (175a, 176a, 181a, 182a). The petitioner explained to the agent that the only thing that he received for his services was a lower price on merchandise to Mother Craft, which was then scarce and which he would not otherwise have been able to obtain (177a). This explanation by the petitioner was supported by the agent's own observation and

testimony. The special agent testified on cross-examination that when he examined the Mother Craft books and records he found several purchases at reduced prices from Schwartz and Levenson, as well as Mother Craft checks to cover these purchases (174a, 176a).

The constitutional concepts of due process and income are clearly not satisfied where the evidence produced by the prosecution establishes that the petitioner did not get the money which formed the basis for the prosecution.

B. Even accepting the Government's theory that the petitioner received and retained the proceeds of the checks, the Government's own evidence reveals that the expenditures exceeded receipts by $22,000.

Agent Shipley testified that to establish a tax liability he traced certain shipments from their point of origin and established the proceeds from the sale of these goods at $107,927.08 (169a, 172a). It was on the basis of this figure that Bell, the Examining Agent, computed the petitioner's tax liability, after first subtracting the sum of $33,614.07, which was given to him as the cost price of these goods (190a). However, the Government's own evidence showed expenditures for merchandise by the petitioner, not of $33,614.07, but of more than $130,000.00.[1] This would establish a net loss from sales of more than $22,000.00, rather than net income.

It is almost too clear to deserve comment that gross income and not gross receipts must be used as the foundation

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[1] Government Exhibits G-15 and G-18 (212a, 213a), which are Accounts Receivable cards of Beaunit Mills and Pacific Mills pertaining to Bridgeport Luggage, show that Samuel Cohen paid these two firms the sums of $96,468.42 and $43,631.47 (56a, 58a), and it was the government's theory that except for three or four shipments which Cohen used himself, Swidler gave Cohen the money to pay for all of these purchases. Taking 90% of the Beaunit figure to allow for the purchases Cohen made on his own behalf, it can be seen that Swidler paid $86,821.57 for goods from Beaunit and $43,631.47 for goods from Pacific, or a total of $130,453.04 (4a).

for establishing income tax liability; *Clark v. United States*, 211 F. 2d 100, 103 (8th Cir. 1944).[2] In order to calculate income, total expenditures must be first subtracted from the proceeds of sale; *Burnet v. Logan*, 283 U. S. 404 (1931). See also *Hofferbert v. Anderson Oldsmobile*, 197 F. 2d 504 (4th Cir. 1951) and cases cited therein; *Mertens, Law of Federal Income Taxation*, Sec. 5.07.

Nor is the Government entitled to establish gross income by deducting only those expenditures which it picks and chooses out of a welter of transactions. The Government having introduced evidence of gross receipts from the sale of goods, in this case of $107,927.08, cannot determine that it will deduct from that figure only the amount which it calculates as the cost price of those particular goods. If the evidence shows expenditures by the petitioner of $130,000, he is entitled to a deduction of that amount from the gross receipts figure. The law is clear that business transactions cannot be "atomized" for tax purposes; *Helvering v. New Haven & S. L. R. Co.*, 121 F. 2d 985 (2nd Cir. 1945). They must be viewed as a whole; tax consequences cannot be determined by treating component steps of a transaction separately; *Burton v. Commissioner*, 190 F. 2d 115 (5th Cir. 1951); *Forrest Hotel Corp. v. Fly*, 112 F. Supp. 782 (D. Miss. 1953).

All circumstances here indicate that the expenditures exceeded the sales and it was, therefore, incumbent on the Government to adduce further positive evidence as to what happened to the goods that were not sold, or, if sold, who received the cash proceeds of those sales. It is well settled that whether or not a defendant submits evidence in his

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[2] There the Government's computation included the cost of all the merchandise the petitioner bought for sale. A different problem is presented where the petitioner claims that the burden is on the Government to establish that he did not have any other deductions. **United States v. Stayback**, 212 F. 2d 313, 317 (C.A. 3d), certiorari denied, 348 U. S. 911. In the instant case the Government by its own testimony established that the actual expenditures exceed the actual receipts.

own behalf, the burden is still upon the Government to prove every element of the offense beyond a reasonable doubt. The Government attempted to smuggle in a fantastic theory of only selecting partial expenditures to create an income liability. This is a fiscal impossibility. It is submitted that under the Constitution, taxes can only be levied on net income and not on partial gross receipts.

C. The charge of the trial court not only violates the principle, enunciated in the *Holland* case, that the charge in a tax evasion case should be especially clear, and should include, in addition to the formal instructions, a summary of the nature of the method relied upon by the Government, and the inferences available to the accused; but is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit in *United States v. Phillips*, 217 F. 2d 435.

The only portion of the Judge's Charge which refers to the evidence presented in this case was as follows (204a):

> "What is the contention of the Government in this case? The contention of the Government in this case is that they have proved to you a pattern of conduct on the part of this defendant in the obtaining and selling of piece goods or cotton merchandise; that over a period of time and in the year 1945 he engaged in transactions running into a few hundred thousand dollars; out of that they have taken certain individual items and from those individual items that have been testified to here they have taken certain ones as to which they say: 'We have traced these goods from the mills to the ultimate purchaser. They were sold through the defendant under the names of Levenson and Schwartz and therefore we charge he received the profits, the total sum less the cost of the goods, and, therefore, he received taxable income which he did not report, in the sum of $74,000, and he owes a tax of some $46,000 on it over and above that which he reported.' "

A trial court need not charge on the evidence, but if it does it must present both sides and not charge only on "the contention of the Government." The jury might well have concluded under the circumstances of this case that the trial judge and the Government were synonomous. It must not be one-sided. The petitioner had contended throughout the entire trial that he had sold goods not for himself but on behalf of others; that his reason for doing this was to obtain merchandise for his own small business; that the profits from the transactions were not kept by him, but were turned over to other people. This was the petitioner's "contention." Merely affirming a point for charge is not stating what the petitioner's "contention" was. Especially is this most prejudicial where in a case based on circumstantial evidence, the circumstances that tend to show the petitioner's innocence are not mentioned by the Court, only the circumstances that tend to show his guilt.

In the Government's brief, on page 24 in the court below, the Government contended that testimony elicited on cross-examination is not sufficient to create a defense. The decision of the Court of Appeals *sub silentio* places its stamp of judicial approval upon the Government's argument.

Throughout the entire course of the trial the petitioner consistently presented the defense that he received no money from the Schwartz and Levenson transactions. That defense was presented by means of extensive cross-examination of most of the Government witnesses, and the petitioner was entitled to a charge on his defense. This very point was passed upon in *United States v. Phillips*, 217 F. 2d 435, 440 (7th Cir. 1955), in which the Court stated that a defendant is entitled to a charge with regard to his theory of the case on the basis of his cross-examination of Government witnesses:

> "Thus it is inherent in this statement, given as the reason for denying the instruction, that the defendant was not entitled to an instruction based upon favorable testimony given by government's witnesses, but that as

a prerequisite to his right to such an instruction, there must be testimony coming from his side of the case. We think this was clearly an erroneous idea, the effect of which was to shift the burden of proof."

The Court further stated, at page 441:

"We think the government's contention, apparently embraced by the trial court, that a defendant is not entitled to an instruction embodying a theory merely because it is predicated upon proof adduced by the government, is not the law. A case closely in point is *Tatum vs. United States*, 88 U. S. App. D. C. 386, 190 F. 2d 612, wherein evidence relative to defendant's sanity was offered by the government. A judgment of conviction was reversed because that issue, under proper instructions, was not submitted to the jury, even though the trial court was not requested to do so. The court stated, 190 F. 2d at page 615: 'But as soon as "some evidence of mental disorder is introduced, the prevailing rule in most jurisdictions is that sanity, like any other fact, must be proved as part of the prosecution's case beyond a reasonable doubt" '."

The court on the same page quoted from *Davis v. United States*, 160 U. S. 469, 487, 16 S. Ct. 353, 40 L. Ed. 499:

" 'Strictly speaking, the burden of proof * * * is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. * * * the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, by whatever side adduced, guilt is established beyond a reasonable doubt'."

Nor is the failure of petitioner to specifically request such a charge fatal, for the error is one "affecting substantial

rights" and is cognizable by this Court of its own motion under Federal Rules of Criminal Procedure, Rule 52(b).

Your petitioner submits that this charge is basically erroneous; that it violates the principles laid down by this Court in the *Holland* case; and specifically fails to recognize that a defendant may establish his defense based upon favorable testimony given by Government's witnesses on cross-examination. This is a question plainly in the public interest since it is likely to be presented in current and subsequent criminal proceedings.

2. According to common experience few shafts strike deeper into jurors' minds during trial than words spoken by the presiding judge. It is also perfectly clear that the practical repercussions of his utterances cannot always be clearly traced to and through jury verdicts. But this case does not involve gossamer possibilities of prejudice to a defendant; it is submitted the cumulative effect of the trial Court's comments, rulings deprived petitioner of a fair trial. *Some* of the prejudicial errors committed by the trial Court are:

A. The trial court gravely prejudiced the defendant by questioning the handwriting expert about the defendant's wife's signature.

Serious prejudicial error was committed by the trial court when he asked the Government's handwriting expert whether there was any similarity between Lilyan Swidler's signature and the endorsements of the name of Charles Schwartz. These questions came at a critical point in the trial. The handwriting expert, Goldblatt, had testified that his study of the various checks brought him to the conclusion that the name "Charles Schwartz" had been written in a disguised hand (141a); but even after four months of analysis he was not able to say that these endorsements had

been written by the defendant, David Swidler (148a). Whereupon, the following colloquy took place:

"BY THE COURT:

"Q. Look at G-48 and see if you see anything on there that is similar to anything in Group 2 of your chart.

"A. First, Your Honor, I would like to say that this is what we might call an off-the-cuff statement, and I haven't ——

"Q. I am just asking you if there is anything on there that might be—let us not say that it is—that might be referable back to Group 2.

"A. There is a possibility that the S appearing in the signature Lilyan Swidler has a similarity to the capital S appearing on the endorsement.

"Q. You are not making any statement, however, as an expert? You are just saying that at a glance, but you are not saying anything at all about it? You are not connecting it?

"A. No, I am not. I just say that there is a possibility of similarity in the capital S in the name Swidler appearing after Lilyan and the capital S's appearing on the endorsements of the questioned checks.

"Q. That would require intensive study for a long period of time?

"A. It would, sir.

"Q. Before you could make any ——

"A. That is correct.

"MR. LEES: I have no objection, sir, if Mr. Kossman (412) wants to enter into a stipulation that were Mr. Kossman's expert here he would say the same thing.

"MR. KOSSMAN: Except for any off-the-cuff statement, which is not part of it, really.

"THE COURT: No."

It is submitted that such "might be" questions by the Court prevented the defendant from cross-examining the

expert on his "non-expert" opinion. The fundamental rule applicable to receiving opinion evidence was here violated, and under the circumstances of this case was most prejudicial to the petitioner. See *Wigmore on Evidence,* Sec. 2011.

In suggesting to the handwriting expert to examine whether petitioner's wife might have been the one who signed the endorsements on the Schwartz checks, the judge injected into this case a prejudicial element incapable under the circumstances of being rebutted. When the expert answered that this was a "possibility" the jury was left with an impression that seriously damaged the petitioner since a jury may well believe that an expert can determine *without analysis and study* what is not so readily apparent to the Jury. This is even more harmful to petitioner when such impression is created by means of questions posed by the trial judge.

B. The Court erred by asking the Government's tax expert what the defendant's tax liability would be if the Government's figure were cut in half.

After Bell, the Examining Agent, had testified as to what the defendant's tax liability would be, based upon a figure of $107,927.08 received from sales of the goods traced by Agent Shipley, the following questions were asked by the court (192a):

> "Q. May I ask you one question. If the $107,927.08 were cut in half, as far as income was concerned, which would amount to $53,963.54, and the goods cost the same, $33,614.07, which is a differential of $20,349.47, *would that result in a tax liability?*
>
> "A. Oh, yes, sir.
>
> "Q. *This is just an assumption that has no bearing. I am just making an assumption.*
>
> "A. Yes, sir, it would.
>
> "Q. What would the tax liability be on that? In

other words, instead of the $74,313.01 figure you would have a figure to start with in place of that of $20,349.47?

"A. I get $9,954.48.

"Q. $9,954.48?

"A. Yes, sir.

"Q. Taking the assumption that the price received was only half of $107,000?

"A. That is right, sir.

"Q. It would still leave a tax liability of $9,954.58?

"A. That is right, sir.

"THE COURT: All right. Proceed, Mr. Lees." (Emphasis supplied.)

The judge should not have asked the revenue agent what petitioner's tax liability would be if he had received only half the income with which he was charged. This question obviously suggested to the jury that the judge was of the impression that the petitioner shared the profits from the Levenson and Schwartz transactions with some other person. The prosecution had not relied upon this theory of some other person in the proof of its case, and the prejudicial effect of this question is certainly not removed by the Court stating that this was "an assumption that has no bearing". It is submitted that the judge put aside the cloak of impartiality required of him and assumed the role of prosecutor in suggesting this theory to the jury. The Court asking a revenue agent whether there would be any tax liability if the gross income was cut in half, of necessity, must usually receive an affirmative answer which under the circumstances of this case and other similar cases is most prejudicial. Prosecution should be left to the officials who are charged with that duty and not to the trial judge.

C. The Court erred in withdrawing from the jury the vital issue of the credibility of witnesses for the Government by his remarks.

Interrupting the cross-examination by counsel for the petitioner, the Trial Court made the following remark:

> "I made that observation in fairness to defendant. If you want another observation at the conclusion of this case about what has happened in this trial I will also make it, but it won't be in fairness to the defendant" (186a).

It is submitted that the effect of this remark was to withdraw the issue of credibility of certain specific Government witnesses from the jury by stamping what they had said at this trial as true, although at the first trial these witnesses had testified differently. A trial court cannot withdraw the issue of credibility of witnesses from the jury. In stating that any remark he might make at the close of the trial "won't be in fairness to the defendant", the judge injected a mental toxin in the minds of the jury that under the circumstances of this case sealed his doom. According to the ordinary, average, human way of thinking, which is what the jury represents, such a comment would clearly indicate to the jury that the judge in this trial even before it was over was unfair to the defendant only because he believed him to be guilty. It is submitted that this was a most prejudicial statement, especially coming from the judge, who the jury knew had presided at the first trial and had granted a new trial.

A trial court has no right to make any "observation" that is not "in fairness to the defendant". This is most fundamental, and it's clearly a violation of the constitutional right of the defendant to have a fair trial by jury.

D. The Court erred in unduly restricting the cross-examination of the Government witness.

Samuel Cohen was an important witness. He testified at great length on behalf of the Government. On cross-examination he was asked the following question: "Would you tell the court and jury how much money you are claiming from the Government at this time?" An objection to this question by the Government was sustained (43a).

It is submitted that it is most elementary that the size of a witness' claim might well affect his motive in testifying for the Government under the circumstances of this case. The witness had a claim against the Government. If he had received, directly or indirectly, the income charged to the petitioner his claim against the Government would have been in jeopardy. The motive of a witness is a proper subject for cross-examination. *Alford v. United States*, 282 U. S. 687; *McFarland v. United States*, 174 F. 2d 538; *Wigmore on Evidence* (3rd Ed. 1940) Sec. 967.

E. The Court prejudiced the defendant by interrupting the defendant's counsel's address to the jury and in sending the jury out in the middle of the address.

In spite of the fact that Government witness, Cohen, stated repeatedly during the course of his testimony (41a, 46a, 47a, 54a, 55a) that he made no money out of his dealings with the defendant in 1945, and Internal Revenue Agent, Shipley, stated that Cohen had so told him (187a), when the defendant's counsel referred to this fact in his summation to the jury he was interrupted by the Court and asked to find a statement by Cohen to that effect in the record (195a, 197a).

The Court justified the interruption on the ground that

he wanted to be sure of Cohen's testimony, since he might want to charge the jury on Cohen's credibility (198a).

During the course of the ensuing colloquy, the Court stated (196a, 197a):

> "THE COURT: All right, come up with it later. If it is there, you can come up with it later. I just didn't remember that statement, that he had admitted that on the stand, that he had not included the profits made from the sale of this merchandise on the books of the company. I don't remember him saying that.
>
> "MR. KOSSMAN: Yes, I had that copied from here directly, Your Honor.
>
> "THE COURT: I don't remember him saying it. He may have and I would like to find it if I could, because it may make a slight difference in my charge on the question of credibility. That is the only reason I interrupted you. Having been interrupted, don't you think we ought to take a five-minute recess because we have been stopped for several minutes now? We will take a five-minute recess, members of the jury. If you find it let me know.
>
> "I don't mean to interrupt the speeches, but since we are stopped, make it ten minutes, members of the jury."

And yet, during Cohen's testimony the Court had let it be clearly known that he understood Cohen's testimony on this point and was only concerned whether counsel for the defendant understood it (54a):

> "Q. Do I consider your answer you made no money?
>
> "A. That is right.
>
> "THE COURT: *He said emphatically, 'There was no money made by me.' That was the end of the answer. I am not sure you heard it.*" (Emphasis supplied.)

It is submitted that this conduct on the part of the Court constitutes the gravest prejudicial error. If counsel for the defendant had made a misstatement of the facts, since the District Attorney did not object and the Court was only concerned with the charge that he was going to make (196a), there was no necessity for the interruption. Any misstatement of the facts could have been remedied by the Court after the address. But there was no misstatement of the facts. It is submitted, that the Court created the impression with the jury that defendant's counsel was misstating the evidence, and prevented a fair and dispassionate consideration of the evidence by the jury. Again it is earnestly urged that this action by the Court completely and irrevocably sealed the doom of the defendant.

In *Quercio v. United States*, 289 U. S. 466, 470 (1933), this Court stated:

> "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be onesided'; that 'deductions and theories not warranted by the evidence should be studiously avoided'."

The principles of the above decision, we submit, were not followed by the trial court in this case. The comments by the trial judge, the injection of foreign prejudicial issues into the case, the prejudicial interruption of counsel's closing argument to the jury, the limitations on cross-examination, the failure to charge on petitioner's theory of the case, make this case one in which the trial judge so far departed from the accepted course of judicial impartiality with the sanction of the court below, as to call for an exercise of this Court's power of supervision.

Petitions for writs of certiorari on the basis of the denial of a fair trial because of the conduct of the trial court have been appearing with increasing regularity. Accordingly, it would appear proper at this time for this Court to *redefine* the standards of judicial conduct to be followed by trial judges in criminal cases.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for Petitioner.

Appendix

OPINION.

UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

No. 11,475.

UNITED STATES OF AMERICA,
vs.
DAVID SWIDLER,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued March 11, 1955.
Before McLAUGHLIN, STALEY and HASTIE,
Circuit Judges.

OPINION OF THE COURT.

(Filed March 22, 1955.)

PER CURIAM.

From our own examination of this income tax evasion case we are satisfied that (1) there is substantial evidence

in the trial record to justify appellant's conviction and (2) the trial court's comments, rulings and charge did not deprive appellant of a fair trial.

The judgment of the district court will be affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT.

UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

No. 11,475.

UNITED STATES OF AMERICA,
vs.
DAVID SWIDLER,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: McLAUGHLIN, STALEY and HASTIE,
Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

March 22, 1955.

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 11,475.

UNITED STATES OF AMERICA,

VS.

DAVID SWIDLER,

Appellant.

SUR PETITION FOR REHEARING.

Present: McLAUGHLIN, STALEY and HASTIE,
Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court,
McLAUGHLIN,
Circuit Judge.

Dated: April 15, 1955.
(Received and Filed
April 15, 1955.
Ida O. Creskoff, Clerk.)

No. [redacted] 70

FILED
MAY 12 1955
HAROLD B. WILLEY, C

In the United States Court of Appeals

For the Third Circuit

No. 11,475

UNITED STATES OF AMERICA,
Appellee

v.

DAVID SWIDLER,
Appellant

Appeal from the Judgment and Sentence of the District Court of the United States for the Eastern District of Pennsylvania (Criminal Action No. 16639).

APPELLEE'S APPENDIX

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 16639

United States
vs.
David Swidler

I.

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

[2] SAMUEL M. COHEN, having been duly sworn, was examined and testified as follows:

[34] *Cross Examination*

* * * * * * * * *

[75] BY MR. KOSSMAN:

Q. And this is the last question I am going to ask you, Mr. Cohen:

Back in 1945 you purchased merchandise from mills, which you say Mr. Swidler gave you the money. Sometimes he paid in advance, prepaid. You knew, you now testify, that you were doing something illegal

using that priority that the Government had given to you to use for your goods, for your purpose. You allowed shipments to come out, and you say you didn't make and you weren't the man who made all the profit, aside from the small commissions that Mr. Swidler might have made. Now, what is your answer to that?

MR. LEES: I object to the question.

THE COURT: Sustained. This is the first time I ever heard of Mr. Swidler making any commission on anything, so that question is completely improper the way it is framed.

[76] MR. KOSSMAN: I will reword it. Let us put it this way.

THE COURT: He has testified to every part of the question except that you now have thrown in that Swidler made commissions on these transactions. That is the new part of the question, and that isn't even in the case yet.

• • • • • • • • • •

[138] MILTON SIMON, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

Q. Where do you live, Mr. Simon?

A. 11 Riverside Drive, New York City.

Q. And your business?

A. I am with Gimbel Brothers Central Buying Office.

Q. In 1945 what was your business?

A. I was with Kaufmann's for a short while in Pittsburgh, and the New York Office.

Q. What kind of work were you doing?

A. Same work as I do today, assist the buyers when they come to town and take them around to market, and market reports.

Q. In 1945 did you know David Swidler, the defendant in this case?

A. I met Mr. Swidler.

Q. Where did you meet him?

[139] A. The first time I met him I met him down at a cafe in White Street.

Q. Do you remember who introduced you?

A. I don't think I do. I was at lunch. I know it was around lunch time.

Q. Under what name was he introduced to you?

A. I believe it was Mr. Levenson.

Q. Just Levenson? Was there a first name?

A. Levenson, that is all.

Q. Did you have a conversation with him?

A. Just to the extent of some merchandise, that is all.

Q. What do you mean, to the extent of some merchandise?

A. Our New York Office at that particular time, merchandise was scarce in the market, and one of our ready-to-wear buyers—I just don't remember her name—she was always after us people to look around and see if we couldn't get merchandise so that they could manufacture or buy goods for their manufacture. We wouldn't buy it but recommended someone who would have goods, so the manufacturer could make garments, either linings or piece goods, or whatever it might be, and if we saw anything

like that we were supposed to come back to the office and report it.

Q. I take it that the goods that the manufacturers made were to be used by you?

[140] A. Yes, some of the goods, that is right, to help make our orders.

Q. All right, now, having stated that fact, what did you say that Mr. Swidler talked about to you?

A. Why, there was some linings, I had been instructed to look for some linings, and Mr. Swidler happened to have some merchandise there that we thought would fit into the picture of linings, so I recommended him to a manufacturer. I came back and told the ready-to-wear girl first, and she asked me to please have Mr. Swidler or Mr. Levenson get in touch with this manufacturer.

Q. Where did you take Mr. Swidler?

A. To a manufacturer over, I believe, on 7th Avenue. I am not sure of the address.

Q. What was the name of the firm?

A. Diamond, Mrs. Diamond. I don't remember the name of the firm. If that was the name of the firm, I wouldn't be sure.

Q. Do you know what she manufactured?

A. I believe it was coats. She was looking for linings.

Q. You took Mr. Swidler there; is that right?

A. That is right.

Q. When was that, do you remember?

A. Just exactly, I couldn't say, but it was very shortly after I met him, because he had the merchandise and I had reported to [141] the office. They asked me to contact the man again, and I did, and I made an appointment to meet him up there and introduced him to Mrs. Diamond.

Q. Did you introduce him?

A. Yes.

Q. Were you present in their conversation?

A. No.

Q. And when you introduced him to Peggy Diamond—what did you say her name was?

A. Diamond.

Q. When you introduced him to Mrs. Diamond, how did you introduce him?

A. This is a man that got some linings—Mr. Levenson—and that was it.

Q. What happened then?

A. Mrs. Diamond bought some goods, as I understand, from him.

Q. Well, now, you weren't present when they had the conversation?

A. No, I was not.

Q. Is that all you know about the transaction with Mrs. Diamond?

A. No. Something went wrong with the goods, and she came to our office or she contacted someone, I guess the buyer in our [142] office, to—

Q. What did you do? Don't tell us about a conversation.

A. No. I am leading up to exactly what happened, if you will allow me.

Q. Just tell us what happened.

A. The lady that bought the goods contacted our office, would I please contact the man that sold her the goods, she wants to talk to him. Something went wrong with the linings. Whatever it was, I don't know.

Q. Did you get in touch with him?

A. I contacted the man. I got the number and I had him go up to see Mrs. Diamond.

Q. You told him to go up to see Mrs. Diamond?

A. Yes.

Q. Did you take him up or just give him the message?

A. No, I told him.

Q. Do you know whether he went?

A. I believe he did.

Q. Because somebody told you?

A. I believe he did, that is right.

Q. And that is all you know about Mrs. Diamond; is that right?

A. That is all.

Q. Do you know about any other transactions that Mr. Swidler [143] had in 1945?

A. Kaufmann's Department Store, the buyer bought some goods from him and the goods were returned.

Q. You are going too fast. You say that Kaufmann's bought some?

A. Yes, the buyer.

Q. Were you present when that sale was made?

A. No, I wasn't present when the sale was made. When it was talked about. Some goods, merchandise was shown to the buyer.

Q. You had a conversation with Mr. Swidler about some goods?

A. That is right.

Q. And somebody else?

A. Mr. Swidler and the buyer had conversations.

Q. Who is the buyer?

A. Harry Meyer, that was his name.

Q. Were you present?

A. When they had conversation about the goods, yes.

Q. What did they say?

A. Well, they just showed him the goods.

Q. Who showed the goods?

A. Mr. Levenson showed the goods to the buyer, and the buyer looked at the goods and made up his mind whether he was going to buy it or not, and later on he bought the goods and they were [144] shipped into Kaufmann's.

Q. Do you know what goods were purchased by Kaufmann's at that time?

A. I believe there were some—

Q. If you don't know, say so.

A. To the best of my knowledge—

THE COURT: When a person says he believes, a non-professional witness sometimes uses the language of the street. When he says, "I believe," that is his recollection. Is that what you mean?

THE WITNESS: To the best of my knowledge, yes, sir.

THE COURT: All right, go ahead.

THE WITNESS: To the best of my knowledge, there were some plain goods and some prints. Now, what they were, I couldn't say. I don't remember.

BY MR. LEES:

Q. What else happened in connection with that transaction, if anything?

A. Later on the goods came to the store, and they were returned. Harry Meyer, I believe he quit at that particular time or just a little bit after that, and the goods

were returned to Levenson, and Mr. Levenson brought the money, the cash, in for the goods that Mr. Kaufmann had paid him for, and it was returned by Mr. [145] Kaufmann.

Q. Were you present at that transaction?

A. I saw that transaction take place.

Q. Where did that take place?

A. In the New York Office on 5th Avenue and 41st Street, upstairs.

Q. How much money did you say Mr. Levenson or Mr. Swidler returned? How much was it?

A. I wouldn't know right now. I wouldn't remember that. I am assuming it was the amount of the invoice, as long as they returned the goods. I am assuming.

Q. What did he say at the time?

A. I don't think there was too much conversation about it, as far as I can remember. I just watched the transaction, the money going back, and that was all. I was very busy in my office.

Q. You were present there because you were working at the time?

A. That is right, that is right.

Q. Did he hand him a check or did he hand him a lot of money?

A. I believe it was cash.

Q. Did you see what type of cash? Was it gold or silver or paper, or what?

A. I believe it was bills.

[146] Q. Have you had anything to do with Mr. Swidler since that time?

A. No, I have not.

Q. Did you know him by any other name but J. Levenson at that time?

A. Not at that time, no.

Q. Was he ever introduced to you as anything else?

A. No.

BY THE COURT:

Q. You did learn his name was Swidler, however, later, didn't you?

A. I heard it later on, yes, sir.

* * * * * * * * *

[166] WILLIAM J. STEIN, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

* * * * * * * * *

Q. Did you know the defendant, David Swidler, in 1945?

A. Yes, I did.

Q. What name did you know him as?

A. David Swidler.

Q. How did you know him at that time?

[167] A. He was a customer where I was employed.

Q. A customer of Milton C. Blum?

A. A customer of Milton C. Blum.

Q. Did you have any business transactions with him?

A. The house had some transactions with Mr. Swidler.

Q. Did you have any transactions?

A. Yes, I did.

Q. Will you tell His Honor and the members of the jury what that transaction was?

A. Well, there were numerous transactions whereby goods were obtained for Mr. Swidler.

Q. Who obtained the goods?

A. I obtained the goods for Mr. Swidler.

Q. How did you start? Tell me how or why you procured goods for him?

A. Well, Mr. Swidler came into the office, and he asked if there were goods obtainable outside of our office or outside of where I was employed.

Q. He asked you this?

A. Yes, and I said I thought I could obtain some goods for him.

Q. What kind of goods did he say he wanted?

A. Cotton goods.

Q. Did he say for what purpose?

[168] A. No. Frankly, I don't recall, and I obtained some goods for Mr. Swidler.

Q. Where did you obtain those goods?

A. I obtained the goods from Regal Equipment.

Q. And that is where?

A. They were located on Broadway in New York City.

Q. Now, when you say these goods came from Regal Equipment Company, what do you mean? Did they take Mr. Swidler there? Did you call him up? Did you write a letter? How did the transaction develop?

A. When goods were obtainable I talked with Mr. Stein of that company, and when goods were obtainable—

Q. You say Mr. Stein?

A. Mr. Stein is or was the head of Regal Equipment.

Q. You are Mr. Stein, too?

A. That is correct.

Q. What is this man's name?

A. His name is Mr. Stein.

Q. What is his first name?

A. Murray Stein.

Q. Is he here in court today?

A. Yes, he is.

Q. Are you related to him?

[169] A. No.

Q. All right, continue, sir.

A. When goods were obtainable, when Mr. Swidler came in I mentioned it to him, or if he asked me if there were any goods, I determined what was available and mentioned it to him. He either called me or I called him when he was in town.

Q. And you would say what?

A. I would say that there were X amount of goods available, and he would say, "Well, fine," and a good would be consummated whereby the goods would be shipped according to whatever instructions I was given or the company was given.

Q. Who gave you the instructions?

A. David Swidler.

Q. Do you know whether or not David Swidler had dealings directly with Regal Equipment?

A. I don't think he did.

Q. They were through you?

A. That is correct.

Q. How would he give you shipping instructions? Over the telephone or would he see you?

A. He would either see me or call me.

Q. Would they be written down?

A. Not necessarily.

[170] Q. And you would do what?

A. I would inform the shipping department of Regal Equipment to ship the goods, or a call possibly may have come in and told them to ship the goods.

* * * * * * * * *

[171] Q. Did Mr. Swidler ever give you any money for this?

A. Yes, he did.

[172] Q. How much?

A. $2500.

Q. When did he pay you that?

A. At various times.

Q. And how did he pay it to you?

A. In cash.

Q. Did he ever give you a check?

A. No, sir.

Q. Did you ever have anything to do with the billing from Regal to Swidler?

A. No, sir.

Q. Did you ever have anything to do with the billing from Swidler to whoever got the goods?

A. No, sir.

Q. Did you ever have anything to do with the payment from Swidler to Regal for the goods?

A. No, sir.

Q. Maybe I didn't make myself clear when I asked you if you had anything to do with the payment. I didn't mean did you ever pay it yourself. Did Mr. Swidler ever give you money to give to Regal?

A. There were transactions once or twice when there was a check given to me to give to them.

[173] Q. You say once or twice he gave you checks?

A. I don't recall the exact number of times, but I know on certain instances there were checks given to me to give to the company in payment for the goods received.

Q. Did he ever give you cash to give?

A. No, sir.

Q. Pardon me?

A. No, sir, other than what I had stated.

Q. Now, turning your attention to those few checks which you say that Mr. Swidler gave you, who was the maker of the checks, if you remember? Whose checks were they?

A. Frankly, I don't recall.

Q. Who is the payee, do you remember that?

A. To Regal Equipment.

Q. Did Regal always accept the checks?

A. To the best of my knowledge.

Q. Did they ever return any to Swidler through you?

A. Well, there was one check that there was some question about. I don't recall.

Q. What do you mean there was some question about?

A. Well, there was one check that was refused on some grounds. I don't recall which at the moment.

Q. When you say "refused" you mean Regal wouldn't take it?

[174] A. Regal did not accept it and asked me to return it to Mr. Swidler for another check.

Q. What kind of check did they want?

A. Frankly, I don't recall, but there was some problem at the time, and I don't recall exactly what it was.

Q. Well, what did you do with that check?

A. I returned it to David Swidler.

Q. Did you send it to him?

A. No, I believe I gave it to him when he was in New York.

Q. You gave it to him because you met him on the street, or what? Did you call him to have him come and get it?

A. No, I think it was on one of his visits to New York.

Q. What did he do with the check, if you know?

A. Frankly, I don't.

Q. Did he give you another check?

A. I believe another check was sent to the company.

Q. Not through you?

A. That is correct.

Q. Have you ever had any other transactions with the defendant except at that time?

A. No, sir.

MR. LEES: Cross examine.

* * * * * * * * *

[225] HARRY GREENBURG, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

* * * * * * * * *

Q. In 1945 did you have any dealings with David Swidler, the defendant in this case?

A. I did.

Q. Did you first meet him in that year?

A. I think I met him the previous year to that.

Q. You think you met him in 1944?

A. Yes.

Q. Under what circumstances?

A. He came up to sell us some maternity dresses.

Q. Did you buy them?

[226] A. Yes.

Q. Do you remember whether he was in business for himself at that time or whether he made sales on behalf of another party?

A. I really don't know if he was in business for himself or not. He represented himself as being in business for himself.

Q. Do you remember the name of the business?

A. Mother Craft.

Q. He said he was David Swidler of Mother Craft; is that right?

A. That is right.

(Photostatic copies of invoices of J. Levenson to Diana Stores Corporation were marked Government's Exhibits 38A to 38F for identification.)

(Checks of Diana Stores Corporation were marked Government's Exhibits 39A to 39F for identification.)

Q. Mr. Greenburg, I show you Government's Exhibit 38A through F and I ask you what they are, if you know.

A. Yes, this is some piece goods he sold us in 1945.

Q. That who sold you?

A. Mr. Swidler.

Q. These are the invoices?

A. Yes.

[227] Q. 38A is an invoice which bears what name?

A. J. Levenson, broker, cotton and rayon piece goods, 105 West 40th Street.

Q. This is the invoice that you received in connection with one purchase?

A. One shipment, yes.

Q. Now I show you Government's Exhibits 39A through F and ask you what they are.

A. Those are checks paid for all these invoices that you showed me just a minute ago.

Q. Whose checks are they?

A. These checks are paid by Diana Stores Corporation.

Q. Of which you were the president then?

A. I was the president, yes, sir.

Q. Are they signed by you?

A. Two are signed by me, two are signed by some other official of the company. The balance of them are signed by some other official of the company.

Q. You say these checks are in payment for these six invoices?

A. Yes, sir.

Q. You have examined them and are satisfied that each check is accompanied by an invoice?

A. Yes, sir.

Q. Who is the payee on all these checks? To whom are they [228] made payable?

A. J. Levenson.

Q. So that the jury may know, will you compare the invoices and the checks and recite the amounts of the checks.

A. The invoice of September 20—

Q. Please refer to them as No. 39A or 38A.

A. 38A was paid by Check No. 39F in the amount of $4157.25.

Invoice dated May 4, $5751.15, was paid by Check 3345, or your reference 39E, for $5751.15.

Q. It will not be necessary to repeat the information about the invoices. I just want the information about the checks, if you will compare them, and then indicate which check it was, the amount of the check, give the number of the exhibit.

A. Check No. 3023 covers invoice of April 26 for $5957.

Invoice G38D for the sum of $5543, was paid by Check G39B in the amount of $5543.

Invoice G38C, for the sum of $5462.50, was paid by Check G39C, $5462.50.

Q. Is that all of them?

A. No, one more transaction. G38B was paid by Check No. G39A, in the sum of $5725.85.

Q. You testified that all these transactions were with Swidler; is that right?

A. Yes, sir.

[229] Q. And each invoice bears the name of J. Levenson as the man who purportedly sent the goods; is that right?

A. These checks were paid to J. Levenson, who supposedly delivered the merchandise to us.

Q. How did you receive the invoices, do you remember?

A. They came in by mail or he brought them in. I don't remember exactly. He may have brought them in himself or mailed them in.

Q. How did you pay the checks? By mail or by delivery?

A. The checks were paid to Mr. Swidler in person.

Q. All of them?

A. All of them.

Q. Where?

A. In our office. He would come up the next day. We would get the goods like today, and he would come up the next day and collect for it.

Q. You testified, I think, that when you first knew him you knew him as David Swidler of Mother Craft.

A. Yes.

Q. And then you had these other transactions, and the invoices all came from J. Levenson; is that right?

A. Yes.

Q. Did Mr. Swidler tell you anything about J. Levenson?

A. I didn't know anything about J. Levenson.

[230] Q. Did you ever ask him about J. Levenson?

A. No, I did not.

Q. Did you ever have any conversation at all about J. Levenson?

A. I did not.

• • • • • • • • • •

[231] Q. Why did you stop purchasing goods from Mr. Swidler?

A. Well, we thought the goods was a little bit overpriced at the time. It was just right after V-J Day, and the piece goods market went a little downward, and on one transaction he gave us a lower price—

Q. One transaction he did what?

A. On the same piece goods, the last transaction, which came up in September, he sold us at a lower price. In other words, you have five invoices here that cover piece goods at $1.15 a yard, [232] and after V-J Day the market went a little bit downward, and I bought—we complained about the price on it.

Q. You say you complained about the price on it?

A. That is correct.

Q. To whom?

A. To Mr. Swidler.

Q. When was that? On the occasion when he picked up a check?

A. That is correct.

Q. He picked up a check and you complained about the price?

A. That is correct.

Q. And what happened then?

A. The next lot of piece goods I bought at 75 cents per yard, and that was the last transaction, I think.

Q. Well, when you told him that the goods were priced too high, what did he say?

A. Well, he told me that was the price of the goods at that time. At this time he was able to give it to us at a lower price.

Q. He said he could sell it to you at a lower price?

A. That is correct.

Q. Did he say anything else?

A. That is all.

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Peggy Diament—Direct

[238] PEGGY DIAMENT, having been duly sworn, was examined and testified as follows:

Direct Examination

* * * * * * * * *

BY. MR. LEES:

* * * * * * * * *

Q. What business are you in, madam?

A. Manufacturing coats and suits.

Q. And in 1945 what business were you in?

A. The same type.

Q. What was the name of your organization?

[239] A. Bader-Diament.

Q. Bader-Diament?

A. It was Bader-Diament. It might have been under Peggy Diament. Bader-Diament, right.

Q. In New York City?

A. That is right.

Q. Did you know Mr. Swidler, the defendant in this case, in 1945?

A. I met him once. That is when I made the purchase. That is when I first met him.

Q. Well, where did you first meet him?

A. In my showroom.

Q. And that is where?

A. I believe it was 512—7th Avenue.

Q. How did you meet him? Did he come in by himself or did sombody bring him in?

A. He was recommended by a woman buyer.

Q. From what store?

A. I believe it was Kaufmann's.

Q. As a result of that recommendation—

A. I met him—pardon me—she was the one that told me that a Mr. Simon, who works for the same organization, was able to have me meet somebody who could—that is, through Mr. Simon I would be able to get some linings.

[240] Q. Did Mr. Simon bring Mr. Swidler to your office or your showroom or did he come himself?

A. In the showroom.

Q. Pardon me?

A. I believe it was in the showroom.

Q. Did Mr. Swidler come alone or did he come with Mr. Simon?

A. Well, if my memory don't fail me, I believe Mr. Simon came with him and introduced me to him.

Q. How did he introduce you to him? What name did he introduce him by?

A. I believe it was Levenson, Mr. Levenson.

MR. KOSSMAN: I beg your pardon?

THE WITNESS: Mr. Levenson.

BY MR. LEES:

Q. You say you believe. Are you saying that you don't know or you aren't sure?

A. No. Well, I remember, you know, meeting him in the showroom, and I believe it was Mr. Levenson, but then later on I found out it was Mr. Swidler.

Q. What did you buy from Mr. Swidler?

A. I made one purchase.

Q. One purchase?

A. Of lining.

Q. Keep your voice up. The jury must hear you, madam.

[241] A. I am sorry. I will try.

MR. LEES: Mark these, please.

(Photostatic copy of Invoice No. 5022 on billhead of J. Levenson, dated 3-21-45, to Bader-Diament, Inc., New York City, was marked Government's Exhibit 40 for identification.)

(Photostatic copy of check of Bader-Diament, Inc., dated March 21, 1945, drawn to the order of J. Levenson, was marked Government's Exhibit 41 for identification.)

BY MR. LEES:

Q. I hand you Government's Exhibit No. 40 and ask you what that is.

A. That is an invoice that I got when I made the purchase.

Q. An invoice you received from whom?

A. From J. Levenson. That is, I got the invoice.

Q. Who handed you or who delivered or how did you get the invoice? Through the mail or did somebody give it to you?

A. No, it was brought up by, to me, I thought then was Mr. Levenson.

Q. Who brought it up?

A. Mr. Swidler.

Q. That is the gentleman sitting next to Mr. Kossman?

A. Right.

Q. You say he handed that to you?

A. He came up the following day after the merchandise was [242] delivered. It was delivered on 27th Street

where the factory was, and he came up the following day after the delivery was made and came up with the invoice.

Q. You say the name is Levenson that is on the invoice?

A. Yes.

Q. And that shows that you purchased what and for how much?

A. I don't know how many yards, but I know what it entailed in dollars and cents. It entailed $18,743. I believe the yardage—would you want me to quote the yardage?

Q. If you remember it or if it appears on the record.

A. Here it is right here, 17,039, probably, and 5 yards at $1.10 a yard.

Q. Government's Exhibit No. 41 is what?

A. That is the check that was issued to him on March 21, in the amount of $18,743.

Q. Signed by whom?

A. Signed by Joseph Bader and Peggy Diament.

Q. He was with you in the business?

A. Right.

Q. You testified that the invoice had the name J. Levenson on it. Will you read the address and the telephone number.

A. 105 West 40th, New York City, Longacre 5-2781.

Q. Now, following the purchase of the lining, will you look at the invoice and the check and tell me if indicates to you [243] when the transaction took place.

A. I am sorry, Mr. Lees. I didn't follow your question then.

BY THE COURT:

Q. What is the date of the check?

A. The date of the check is March 21.

BY MR. LEES:

Q. And did you buy the lining sometime about that time?

A. Yes.

Q. Following the receipt by you of the lining did you have any other further dealings with Mr. Swidler?

A. Any other purchases?

Q. Any other dealings.

A. Oh, yes. I made no more purchases, but I had dealings with him.

Q. Well, tell the jury what they were.

A. Well, after that lining was delivered I found it was inferior.

Q. What do you mean by inferior?

A. It was streaked. I had opened up the cartons before we gave him the check to see what the lining looked like, and opening it up on the table we found that it had a lot of bars and it was streaked, so we stopped payment of the check. We called the bank and stopped payment.

Q. Did you get in touch with Mr. Swidler?

[244] A. No. He came up. There was no way I could get in touch with him. We tried to get Levenson, I think, at that time. We just stopped payment, but he came up.

Q. How did you try to reach Mr. Levenson?

A. By calling this telephone number.

Q. What number is that again?

A. Longacre 5-2781.

Q. What happened when you called the number?

A. There was no Levenson. As a matter of fact, there was no such number, if I remember correctly, but we kept calling, thinking and hoping that we were wrong.

Q. What do you mean when you say there was no such number?

A. I am trying to remember correctly if I can. I believe there was somebody answered the phone. I didn't do the calling. It was my bookkeeper called at the time, and they kept saying—well, one time they said there was no such number and another time they said there is no Levenson.

Q. What happened after that?

A. Well, then Mr. Swidler, who at that time I thought was Mr. Levenson, came in to see me and wanted to know why we stopped payment of the check, and I told him.

Q. What did you tell him?

A. That the goods was not merchantable, it was barred. We couldn't use it because we had to redye it. We couldn't use [245] it in white. It was delivered to us as white goods.

Q. What did he say?

A. I think at that time he even took me over to a friend of his who had a plant, an examining plant, and I think we put it on a roller, and I looked at it, and I said it didn't look right, and he said, "Look, it will be my responsibility." He said, "If you can't use it, I will sell it for you," and under those conditions I took it and I issued him another check.

Q. What happened then?

A. Well, we had some of the goods dyed, and after it was put into the garments, we found that we could not use that type of lining, and I got in touch with Mr.—I couldn't reach him at all, so I got in touch with—

Q. Couldn't reach who?

A. I couldn't reach Mr. Levenson, so I got in touch with Mr. Simon of Kaufmann's, and I told him, "I have been trying to reach this man."

Q. Don't tell us what you told Mr. Simon.

A. Yes.

Q. Were you thereafter able to find Mr. Swidler?

A. No. I went up to the Kaufmann office.

Q. Did Mr. Swidler come to see you thereafter?

A. Yes, he came down to the factory.

[246] Q. What happened at that time?

A. You mean when I told him that I couldn't use it, and he said to me that he would get a customer to buy it, which he did.

Q. He got you a customer. Do you remember the name of the customer?

A. Davison-Paxson, I think.

Q. What are they?

A. They are one of the Macy's stores down South.

Q. Did you ship the goods to them?

A. No. I think it was shipped to a manufacturer. The Davison-Paxon's buyer came up, looked at it, and I sold it to him at the same price that I bought it from Mr. Swidler, and that was all. I think we sent it to a manufacturer that manufactured underwear or petticoats or something, I don't know.

Q. Now, did you yourself try to call that Longacre number?

A. I certainly did.

Q. You yourself tried it?

A. Yes, I did.

Q. How many times?

A. Any number of times, because he was too slow getting rid of the fabric, and I couldn't use it.

* * * * * * * * *

[290] HENRY W. LUDMAN, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

Q. What is your address, sir?

A. 7 Norman Road, Upper Montclair, New Jersey.

Q. What is your business?

A. Real estate salesman.

Q. For whom?

A. For Durand Taylor Company.

Q. Are you the renting agents for 40 Worth Street, New York?

A. Durand Taylor is the renting agent for 40 Worth Street, New York City.

Q. Were they in 1945?

A. Yes.

Q. In response to our subpoena did you bring those records relating to the premises 40 Worth Street for 1945?

A. I did.

Q. Will you examine those records and tell me whether or not Charles Schwartz was a tenant of yours at that time.

BY THE COURT:

Q. Have you already gone over them?

A. I have, sir. They are one statement for each month, sir.

Q. What did your search of those records disclose? [291] Was or was not Charles Schwartz a tenant in that building?

A. My search of the records showed that Charles Schwartz was not a tenant in 1945.

BY MR. LEES:

Q. First, do your records indicate subleasing by individuals from tenants?

A. They do not.

Q. Would it have been possible for this man, for Charles Schwartz, to have subleased in 1945?

A. It could have been possible, but very doubtful.

Q. What was the practice about subleasing 40 Worth Street in 1945?

A. The practice with regard to subleasing was that a tenant, under the terms of the leases in existence, were not to sublet without consulting and obtaining permission from the landlord.

Q. Would your records indicate if anyone had consulted you and sought to obtain consent for Charles Schwartz?

A. They do not indicate any acceptance of Charles Schwartz as a subtenant.

MR. LEES: Cross examine.

Cross Examination

BY MR. KOSSMAN:

Q. Worth Street is in the textile center in New York?

A. It is.

[292] Q. 40 Worth Street is a very large building?

A. It is.

Q. How many floors has it?

A. Sixteen floors.

Q. Could Schwartz have been an employee working for someone there and you wouldn't know?

A. Yes.

Q. Is White Street close to Worth Street?

A. Three blocks.

MR. KOSSMAN: All right, that is all.

HELEN BREEN, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

Q. What is your occupation, madam?

A. Lease custodian.

Q. Lease custodian?

A. Yes.

Q. For whom?

A. Albert B. Ashforth, Inc.

Q. What is their business?

A. Real estate.

[293] Q. In New York City?

A. In New York City, yes, sir.

Q. Is Ashforth the real estate agent for the premises 105 West 40th Street?

A. Yes.

Q. Were they in 1945?

A. Yes.

Q. Did you in response to our subpoena bring the records of those premises for that year?

A. Yes, I did, the rent roll for those years, surrounding years, too.

Q. I show you an invoice which has the heading "J. Levenson, broker, cotton and rayon, 105 West 40th Street." Will you look through your records or will you tell us if you already have?

A. I have.

Q. Was there a tenant by the name of J. Levenson at that address in 1945?

A. I have looked through the records, and there was no tenant by that name at that time or any time.

Q. What was your practice in 1945 with respect to subleasing, if you know?

A. Well, we did sublease. We had a practice of subleasing.

Q. Do your records for 1945 contain any indication that any property or any part of the building was subleased to J. Levenson?

[294] A. They do not.

Q. Would it be in there if a sublease had been arranged?

A. Yes, if it had been done according to routine.

Q. What was the routine?

A. If the sublease had been drawn in the office or we had consented to it in writing, it would have been in the record.

BY THE COURT:

Q. How large a building is that, Mrs. Breen?

A. Offhand I don't know exactly, but I would say nine or ten floors.

Q. Is it an office building?

A. It is an office building with a bank at the basement.

Q. What is the custom of persons that have space in there? Is it the custom to put their room numbers on or their floor numbers, or do they just use the address?

A. Well, it is the custom to have—although I don't handle that directly—it is the custom to have the room numbers on and the names on.

Q. Are the rooms all numbered throughout the building?

A. I don't know positively about that building, but as a rule they are.

MR. LEES: Sir, we have a man from Ashforth who can answer that.

THE COURT: All right.

* * * * * * * * *

[295] MOSES D'AMATO, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

* * * * * * * * *

[296] Q. You are the assistant superintendent and all-around man where?

A. 105 West 40th Street, New York.

Q. What was your job in 1945? In 1945 what was your business?

A. Same.

Q. How long has it been your business?

A. For the last thirty-one years.

Q. Always at 105 West 40th Street?

A. Yes, sir.

Q. I show you this invoice, Government's Exhibit 40, headed "J. Levenson, broker, cotton and rayon, 105 West 40th Street." In 1945 was there a tenant by the name of J. Levenson?

A. No, sir.

Q. Did anybody by that name have an office there or use an office?

A. No, sir.

BY THE COURT:

Q. How big a building is it, Mr. D'Amato?

A. Twelve stories.

Q. Is there elevator service?

A. Yes.

Q. Is there a board with everyone's name?

A. That is right.

[297] Q. Who had charge of putting the names on that board?

A. Well, either myself or the superintendent himself, between the two of us.

Q. Either you or your immediate superior would have charge of that listing board?

A. That is right.

BY MR. LEES:

Q. Do you have access to all of the offices?

A. Yes, sir.

Q. Did you have occasion to visit all of the offices?

A. No, not unless something happens.

Q. What were your duties in the building?

A. Of course, I go around, if they complain about something such as lights may be out of order, or something that isn't just right, naturally, I would go up there and investigate.

Q. You visited the offices, then?

A. Oh, yes.

Q. Did you ever see a J. Levenson?

A. No, sir, not to my knowledge.

Q. Did you ever hear of J. Levenson?

A. No, I wouldn't say I did.

* * * * * * * * *

[304] DAVID GOLDBERG, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

* * * * * * * * *

Q. Did you know the defendant, David Swidler, at that time?

A. I know him. Yes, I have seen him before.

Q. Did you know him in 1945?

A. I did.

Q. Did you have any business transactions with him?

A. I did.

Q. What kind?

A. I bought some piece goods from him.

[305] Q. Under what circumstances did you meet him?

A. He came to my office. He was recommended by someone.

Q. He came alone or with someone?

A. He came alone.

Q. What name did he introduce himself to you as?

A. I don't recall that there was any introduction.

Q. Did he tell you his name?

A. I don't remember if he told me his name.

Q. Did you buy any goods from him?

A. I did.

Q. How many times?

A. Well, it was several times, but I couldn't remember the amount.

BY THE COURT:

Q. Were you billed for the goods you bought from him?

A. Yes, sir.

Q. Under what name was the billing made?

A. Under two names. I believe one Schwartz and one Levenson.

Q. Did you pay for the goods by checks to the persons shown on the invoices?

A. Yes, sir.

Q. Beatrice Sportswear, was it?

A. I believe it was Beatrice Sportswear or Beatrice Manufacturing Company.

[306] MR. LEES: Mark this, please.

(Photostatic copy of accounts receivable ledger of Beatrice Manufacturing Company, pertaining to Charles Schwartz and J. Levenson, was marked Government's Exhibit 44 for identification.)

BY THE COURT:

Q. Incidentally, how did you pay for them? By cash or check?

A. By check, sir.

Q. Did you mail the check or present it to somebody? How did you pay?

A. Mr. Swidler always came up for the check. I presented it to him.

Q. You handed him the check personally?

A. Yes, sir.

(Photostatic copies of checks from Beatrice Manufacturing Company were marked Government's Exhibits 45A to G inclusive for identification.)

(Photostatic copy of invoice of Charles Schwartz, dated April 19, 1945, to Beatrice Manufacturing Company, was marked Government's Exhibit 46 for identification.)

BY MR. LEES:

Q. You said you made purchases from this man and he gave you invoices; is that right?

A. That is right.

[307] Q. Have you testified what the names on the invoices were?

A. I mentioned it. There were two names.

Q. And those names were what?

A. One was Schwartz and one was Levenson.

* * * * * * * * *

[381] EDWARD L. BRAUNE, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

* * * * * * * * *

Q. You brought certain records here at my request?

A. Yes, I have.

Q. Records of what?

A. I have brought the telephone directories issued by the New York Telephone Company for the year 1945, two issues.

E. L. Braune—Cross

Q. Do your records show a telephone number at 105 West 40th Street for J. Levenson? The number would be Longacre 5-2781. [382] Longacre is the exchange. Under the name of Levenson.

A. Will you spell Levenson.

Q. L-e-v-e-n-s-o-n.

THE COURT: J is the initial.

A. In the winter-spring issue for 1945, in the Manhattan alphabetical telephone directory, Page 622, there is no listing in that name at that address or that telephone number.

MR. LEES: Cross examine.

Cross Examination

BY MR. KOSSMAN:

Q. Are you familiar with the general practice in New York, which would be the same in the country?

A. It is pretty much the same all over.

Q. If there is a phone in my name, can someone else use that phone without notifying the Bell Telephone Company, and put it on billheads?

A. That is a practice that is commonly used, yes.

Q. Am I correct in saying that this phone number, Longacre 5-2781, that Longacre was the correct exchange for 105 West 40th Street? If you can't answer that without looking at something, I have got this Bell Telephone paper, so if someone in New York finds a page missing, you will know where it is.

105 West 40th Street, textile company, what is the exchange?

[383] A. 5.

Q. Same as this, correct?

A. That is correct.

Q. Elkins, M., 105 West 40th Street, what is the exchange?

A. Is it 5?

Q. So, therefore, that was the proper exchange for that building and that address; is that correct?

A. I would say that is correct.

MR. KOSSMAN: So would everybody else. Thank you very much. That is all.

BY MR. LEES:

Q. Would all the telephones in the building have the same exchange?

A. Not necessarily, no. New York City is quite large. There is also a Longacre 3 exchange that was active in 1945, but in that general area Longacre would be the exchange. That would cover it, yes, that is correct.

BY THE COURT:

Q. Have you any records that would tell us here today who had Longacre 5-2781 in 1948?

A. No, Your Honor. We made a very careful search, even though I know that the retention period for canceled records is only two years. I wasn't able to find anything, except to bring these two directories that were in existence.

[384] Q. They are the only records that you have now going back that far?

A. Yes, Your Honor, that is correct.

Q. You say your period of retention of canceled listings is only two years?

A. It was two years after cancellation, and that has since been amended, with the permission of the Federal Communications Commission, for one year retention after cancellation or disconnection.

Q. So looking back now you must of necessity refer to your directory distributed to the public?

A. Yes, Your Honor, that is what I did.

Q. There is no listing there?

A. I didn't find any, and I have got the page before me.

Q. Do you have anything for Worth Street there? There is a Worth Street in Manhattan, is there?

A. Oh, yes, it is.

Q. See if you can find a Charles Schwartz listed at 40 Worth Street, as long as we have you here.

MR. KOSSMAN: There was no phone shown, Your Honor.

THE COURT: I know. Maybe we can find out something.

"Schwartz" is spelled in a variety of ways, so [385] show him one of the billheads, will you, Mr. Schuman.

(Exhibit G49 handed to the witness.)

THE WITNESS: In the winter-spring issue I don't find a Charles Schwartz at 40 Worth Street. I will look at the other issue if you wish me to.

THE COURT: Oh, yes, sure. The winter-spring, that would take in the early part of 1945?

THE WITNESS: Yes, Your Honor. Then I have the other issue, which is the summer-fall of 1945.

Stipulation of Counsel

I have examined all the Schwartzes in the summer-fall months, and I don't find any listed at 40 Worth Street, Your Honor.

* * * * * * *

[419] MR. LEES: There are three check cashing agencies involved, sir—the Mintz Check Cashing Agency, the Municipal Check Cashing Company, and one other one, Herbert Greenhouse, and they are all identified, Your Honor may remember, by certain digits, certain letters followed by digits on the back, on the second endorsement. One reason that this man is here from the Hellenic Bank Trust Company is to testify that the endorsement "Pay Hellenic Bank Trust Company or order" with the letter and digit C-100 following it, indicates that it was placed there by the Mintz Check Cashing people.

MR. KOSSMAN: I will agree that all endorsements on checks that have C-100 were placed by the Mintz Check Cashing Service.

I mean, is that so?

MR. LEES: Yes.

MR. KOSSMAN: All right, I will stipulate to that.

THE COURT: How about the Herbert Greenhouse and the other one? What are those numbers?

MR. LEES: The MCCC, Municipal Check Cashing Company, was testified to by Mr. Shipley at the last trial. You allowed him to testify that was a public check cashing agency.

Colloquy

MR. KOSSMAN: I will agree that MCCC is a public [420] check cashing agency. I mean that is the limit of the stipulation. I know nothing else.

THE COURT: Wait a minute. That where an endorsement appears of MCCC, that was deposited in the bank by that check cashing agency?

MR. KOSSMAN: Yes.

THE COURT: So that any inference the jury wants to draw that the check was given to Schwartz or Levenson, it was endorsed, and then this is the second endorsement, a check cashing agency?

MR. KOSSMAN: I can't say who endorsed it.

THE COURT: I don't know who endorsed it, but I say a second endorsement appears through this agency. That is what I am talking about. That is as far as your stipulation goes.

MR. KOSSMAN: Are those checks in evidence?

THE COURT: It either goes that far or there will be testimony about it.

MR. KOSSMAN: Well, let us take a look at the check. If I look at it and it says MCCC, all right. This is testimony that wasn't present last time.

THE COURT: Yes, it was.

MR. KOSSMAN: By a bank man?

MR. LEES: Mr. Shipley testified. There is the C-100.

[421] MR. KOSSMAN: I agree that C-100 means the bank check.

Colloquy

THE COURT: Yes, but that wasn't what the court was talking about.

MR. KOSSMAN: Where is MCCC here?

MR. LEES: This is C-100 (indicating).

MR. KOSSMAN: C-100 I agree.

THE COURT: Anywhere that C-100 appears it is agreed that it was cashed at the Mintz Check Cashing Agency.

MR. LEES: All right.

THE COURT: Now let us take the second one and then let us take the third one. Let us see how far we get with those others. That will not, however, eliminate, as I understand it, Mrs. Mintz as a witness.

MR. LEES: No, sir, not at all.

THE COURT: Now we will see, maybe we can eliminate Greenhouse. Maybe we can eliminate somebody else by stipulation.

MR. LEES: Here is one that says "Pay to the order of Hellenic Bank Trust Company." The only trouble is you can't see the C. It says 39 on it, Mr. Shipley.

Are you familiar with that, sir?

MR. REYNOLDS: 39 is right. I don't remember [422] C-39.

MR. LEES: The 39 indicates Herbert Greenhouse?

MR. REYNOLDS: Greenhouse-Herbert, Limited.

THE COURT: Greenhouse-Herbert, Limited, which is a check cashing agency?

MR. REYNOLDS: Yes.

THE COURT: That represents his endorsement?

MR. REYNOLDS: Yes, sir.

THE COURT: Greenhouse-Herbert, Limited?

MR. REYNOLDS: Yes, sir.

MR. KOSSMAN: I will agree it doesn't say C.

MR. LEES: The C was wrong. It is just 39.

MR. KOSSMAN: All right. Is that all?

MR. LEES: Then we have MCCC.

THE COURT: Does that go for any check that bears that endorsement?

MR. KOSSMAN: That is right.

THE COURT: Any check?

MR. KOSSMAN: Any check.

THE COURT: That is admitted in evidence.

MR. KOSSMAN: Yes. Actually anything with that initial was cashed there. Actually speaking, I mean the way the Government's case is based, an income tax case, they have [423] got certain specific checks which were cashed in a certain check cashing agency, but who got the money is another problem, who got the income.

THE COURT: We meet that at the end of the case.

MR. KOSSMAN: What is the other endorsement? We got rid of 39 and we got rid of C-100.

MR. LEES: The other endorsement, sir, does not relate to any testimony that this gentleman could give you. He may go, as far as we are concerned. We had nobody from MCCC, the Municipal Check Cashing Company.

THE COURT: All right, but you do have some checks. Show them to Mr. Kossman.

MR. KOSSMAN: I will stipulate to some even if you have no witness. I reserve, of course, the right to argue whether all of this is relevant.

* * * * * * * * *

[478] DANIEL K. SHIPLEY, having been duly sworn, was examined and testified as follows:

Direct Examination

BY MR. LEES:

Q. Now, in connection with this investigation did you talk to the defendant?

A. I did.

Q. Did you go to his place of business?

A. Oh, yes.

Q. How many times did you talk to him?

A. Well, on two occasions that I recall.

Q. When was the first time, if you remember?

A. About April 2, 1948.

Q. Where did you speak to him then? Do you remember that?

A. At his place of business, in the office, 139 North 12th Street, I believe is the address.

Q. That is the office of Mothercraft?

A. Yes, sir.

Q. Did you at that time ask him about Schwartz and Levenson?

A. Yes, sir.

Q. Did you ask him if he knew them?

A. I did. He said that Levenson came into his place of business two or three times a week and he bought piece goods from [479] Levenson.

Q. By the way, did he give you his name with respect to the J? Did he tell you what his first name was?

A. No, sir. As I recall, the company had invoices that they paid, which showed the printed name J. as an initial, and Levenson, and it was from that invoice that the questioning began with the taxpayer, so I had no occasion to ask him what the man's first name was. I was going by that invoice.

Q. He told you that Levenson came there; is that right?

A. Yes, sir.

Q. What else did he say about him?

A. Well, I asked him if he had ever sold any merchandise to Einhorn Brothers and he said no. He said he may have sent Levenson there.

Q. Well, did you ask him about Mr. Schwartz?

A. At that time he said he didn't know Mr. Schwartz.

Q. He said he knew Levenson but didn't know Schwartz?

A. Yes, sir.

Q. Did you ask him how you can get hold of Levenson?

A. I asked him if he ever contacted him in New York, and he said no, he came into the office about three times a week and he was able to contact him by reason of those frequent visits.

Q. Did you ask him if he had ever had occasion to call that [480] Longacre phone number or 145 West 40th Street?

A. I never discussed that with him. I asked him how he contacted Mr. Levenson, and he said that Mr. Levenson came into his office, into the Mothercraft premises, about two or three times a week.

Q. By the way, did he give you access to his books and records?

A. Oh, yes.

Q. You looked at his books?

A. Yes, sir.

Q. Do you remember whether you ever saw any references to any of these transactions in the books? When I say "these transactions" I mean the ones you just told the jury about.

A. There was no record reflected on his books of the sales to Bader-Diamond—these that I have just listed—Kaufman's.

Q. Now, you said that he never had sold any goods to Einhorn but he sent somebody there?

A. He said he may have sent Mr. Levenson there.

Q. To do what?

A. Well, I asked him did he ever sell any merchandise to Einhorn Brothers, and his reply to me was that he himself never did but that he may have sent one of the Levensons there.

Q. That was the first time you say you talked to him?

A. Yes, sir.

[481] Q. Did you talk to him on another occasion?

A. I did.

Q. When was that?

A. On January 12, 1949.

Q. Where was that?

A. That was in the office of the Intelligence Division, Internal Revenue Service, in the Ayer Building.

Q. You talked to him once in April, 1948, and then ten months later on?

A. Yes, sir.

Q. Why did you talk to him the second time?

A. Well, it is a procedure established by the Bureau.

Q. What is the procedure? Tell the jury that.

A. When you have completed a field examination, you send a letter out to the taxpayer giving him an opportunity to make explanation of any of the items that you can't reconcile with his return, and in pursuance of that procedure Mr. Swidler was invited into the office to make any explanation he chose to make regarding his income tax liability, and at that time a stenographer was present and his answers were recorded.

Q. On that occasion did you ask him about J. Levenson?

A. Yes, I did.

Q. I take it you asked him a lot of questions at that time?

A. Yes, sir. Well, one of the main questions that I asked [482] him was, did he ever cash any checks at a check cashing agency in New York, and he said no, and I asked him did he ever accompany anyone to those check

cashing agencies when they were cashing checks, and he said no.

Q. Did you ask him about the Mintz Factors, check cashing agency?

A. I did.

Q. What did he say about that?

A. He declined to answer, and I asked him about the Kaufman transaction, if he could explain the fact that Mr. Kaufman had told me that he had something to do—

Q. Don't say—

A. I am telling you what I told the taxpayer.

Q. Go ahead. That is proper.

A. —that Mr. Kaufman had made a statement to me alleging that the taxpayer had participated in a sale to Kaufman's Department Store. I explained that Mr. Kaufman had told me that he had reimbursed Mr. Kaufman for some of the merchandise returned, and could he give me an explanation of that. I said further that the records of Kaufman's Stores indicated that the merchandise was returned to the Morton Rose warehouse, and in my examination I had had previous discussion with Mr. Swidler about the Morton Rose warehouse. He told me that he was a [483] partner with Morton Rose, so I asked him about that merchandise that was returned. He said that Levenson had some merchandise there once for them to look at but they weren't interested in that type of merchandise and he don't know what Levenson did with it.

Q. You are talking about the merchandise from Kaufman's? Is this the merchandise—

A. That was returned from Kaufman's to Morton Rose warehouse, yes, sir.

Q. I take it at this stage of the game when you talked to him you had learned a great deal about the taxpayer; is that right?

A. Oh, yes.

Q. Did you ask him about Samuel Cohen?

A. Yes, I did. I asked him if he ever had any business transactions with Samuel Cohen, because there was a loan appeared on the Mothercraft books of $7500 to Cohen, and he said that he had loaned him some money and that it had been repaid within about three weeks, and as I inquired the occasion of the loan and the detail of the loan, he told me that was none of my business, all I should be concerned about was the loan was paid off in the books, what it was for or why it was done was none of my business.

Q. But he did admit knowing Cohen?

[484] A. Yes, sir, and he denied having any other transactions with Mr. Cohen other than this loan, this $7500 loan.

Q. Did you ask him about all this merchandise that Mr. Cohen has told us about that came to Bridgeport Luggage?

A. No, sir, I didn't ask him a direct question on that. I gave him enough lead in that Cohen—If he wanted to tell me, he could.

Q. Did you ask him anything about this transaction with Mrs. Mann, the lady from California?

A. I did not.

Q. Did you ask him if he knew Peggy Diamond, Bader-Diamond?

A. I did.

Q. What did he say about that?

A. He didn't recall.

Q. He didn't recall what?

A. I asked him if he knew Peggy Diamond, and he said he didn't recall. I said "Peggy Diamond of the Bader-Diamond Company in New York." He didn't recall.

Q. Well, did you ask him if he had sold any goods to Bader-Diamond?

A. No, sir, I did not. I did not.

Q. Did you ask him if he ever used the name Levenson or Schwartz?

[485] A. I did. He said no, but that he may have been mistaken for one of them because he had been with Levenson.

Q. He had been with Levenson where? Where and when?

A. He didn't say where or when. He just said it was possible that he was mistaken for Levenson, as he had been in Levenson's company. That was his answer to me. I don't know why.

Q. What did he say about Levenson on this occasion? Did he say anything else about Levenson?

A. That is the best of my recollection that I have answered, sir.

Q. How about Schwartz? Did he say anything about Schwartz?

A. Not that I recall on this occasion.

Q. What did he say about Beatrice Manufacturing Company, Dave Goldberg's place?

A. I asked him if he ever purchased any goods from Beatrice Manufacturing Company.

Q. What did he say?

A. He said that he never did, but that he had sent Mr. Levenson there and he may have gotten some goods.

Q. Well, did he say that Mr. Levenson worked for him?

A. No, sir.

Q. Did he say he had any transactions with Levenson whereby either one of them gained?

[486] A. Oh, he bought merchandise, he told me, and there were invoices there indicating billings to Mothercraft from both Schwartz and Levenson.

Q. Did he say he bought goods from Schwartz?

A. Yes, sir, but I believe that he said when he bought the goods from Schwartz that he bought it through Levenson, Levenson was the fellow that came there.

Q. Did he ever say Schwartz came there?

A. I don't definitely recall, but my recollection is that he only dealt with Levenson. He got billings from Schwartz, but Levenson was the man that he dealt with.

Q. Did he say he knew Schwartz?

A. No, I don't believe he did. I might say that in connection with that Kaufmann sale, one invoice of which was Schwartz and one was Levenson, that I asked him, I was talking to him at great length, to get the detail of his connection with that transaction, and he declined to answer questions.

Q. What did he say? Did he say anything about Bill Stein?

A. I don't believe I mentioned the name Bill Stein to him.

Q. How about Regal?

A. It wasn't my purpose to disclose the Government's case, Mr. Lees, just to give enough indications of transactions for him to make explanations if he wished to make any.

• • • • • • • • • •

[490] *Cross Examination*

• • • • • • • • • •

[537] BY MR. KOSSMAN:

Q. Now, you interviewed Mr. Cohen, didn't you?

A. Yes, sir.

Q. Am I right?

A. You mean Samuel Cohen of Bridgeport Luggage?

Q. When was the first time you interviewed Mr. Cohen?

[538] A. I couldn't answer that without quite some thought, counselor.

Q. Well, when you came to see Mr. Cohen you knew the goods had been shipped from the Bridgeport Luggage; is that correct?

A. Yes, sir.

Q. Is that right?

A. When I first came to see Mr. Cohen?

Q. Yes.

A. Yes, sir. You mean at the Bridgeport Luggage?

THE COURT: Read the question so I can understand and follow. Read them both. I would like to follow the continuity of it, the previous question, the answer, and then the succeeding part.

(The last three questions and answers were read by the reporter.)

THE COURT: Start all over. That doesn't make any sense.

BY MR. KOSSMAN:

Q. You went to see Mr. Cohen; is that correct?

A. At the Bridgeport Luggage Company.

Q. Yes.

A. Yes, sir.

Q. Mr. Cohen told you he made no profits out of these [539] transactions; is that correct?

A. That is correct.

Q. And he told you that the Bridgeport Luggage Company made no profit out of any of these transactions that we have discussed; is that correct?

A. That is correct.

Q. You went to see Mr. Bassen and Mr. Brodsky in New York?

A. Yes, sir.

Q. And they told you they made no profits; is that correct?

A. Profit out of what?

Q. Out of these transactions.

A. They were not asked a question like that and they didn't answer a question like that. They told me that they permitted the storage of merchandise, otherwise, a drop in New York of merchandise from the Pacific Mills, to be stored in their place. Mr. Brodsky said that it became a nuisance, and then he called on his nephew to intercede with him to have the merchandise dropped at his premises, and that happened, and he no longer had the

nuisance value of the merchandise coming into his place of business.

Q. Did you investigate Mr. Cohen's personal bank account?

A. I personally?

Q. Yes.

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Office Supreme Court, U.
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No. [redacted] 70

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 11,475.

UNITED STATES OF AMERICA

vs.

DAVID SWIDLER,
Appellant.

APPEAL FROM THE JUDGMENT AND SENTENCE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA (CRIMINAL ACTION No. 16639).

ADDITIONAL APPENDIX FOR APPELLANT.

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(146) M. SIMON.

CROSS-EXAMINATION.

BY MR. KOSSMAN:

Q. Do you have any special interest in this case that might keep you from telling the truth?

A. None whatsoever, sir.

Q. By the way, am I correct in saying that before you took the witness stand you were reading the testimony that you gave two years ago; is that correct?

A. That is right, sir.

(147) Q. You were present at the trial two years ago when Mr. Kaufmann testified, is that correct, your former boss?

A. Correct, sir.

Q. And you were present when Mrs. Diamond or Peggy Mandelbaum, Mrs. Peggy Mandelbaum, also known as Peggy Diamond, testified; is that correct?

A. No, sir, I was not. I left and went to New York.

Q. You had already testified?

A. I had testified, that is right.

Q. So you didn't hear what she said?

A. No, I did not.

Q. Now I call your attention to the fact that despite your statement, you were present, because you testified after Peggy Mandelbaum testified, and, in fact, your attention was called to that. You did hear her testify. It is only two years ago.

A. I don't remember.

Q. Well, you stated you went to New York and you did not hear her testify.

A. I believe that is correct when I say that.

Q. I assure you it is not, and I can ——

A. I might be in error, but the way my mind goes right now ——

Q. I will allow the Assistant District Attorney to tell you now, to interrupt, whether you did leave or you didn't leave, (148) to refresh your memory.

A. I wish you would, please.

MR. KOSSMAN: I don't want to take advantage ——

MR. LEES: According to the notes of testimony, you did testimy after Mrs. Diamond testified.

THE WITNESS: Well, it seems to have slipped my memory entirely. I am not trying to evade anything.

BY MR. KOSSMAN:

Q. All right. Now, Mrs. Peggy Mandelbaum at that time testified, in answer to the question on direct examination on page 111, by the Assistant District Attorney, who asked her this question:

"Was he introduced to you by the name of Mr. Swidler or what?"

And Peggy Mandelbaum stated then:

"By the name of Mr. Swidler."

Now, you have no recollection that Mrs. Mandelbaum said that in court?

A. No, I have not.

Q. No recolection. Well, is this the first time your attention has been called to it?

A. Oh, yes.

Q. Let us go back. You were asked this question on cross- (149) examination, page 124. Mr. Swidler's lawyer at that time asked you this question:

"Q. Were you here when Miss Diamond or Mrs. Mendelbaum testified?

You answered then:

"Yes, sir."

Do you remember answering that way?

A. No, I do not.

Q. Well, I assure you you did.

A. I am not questioning you. If you say I did, probably I did, but I don't remember. I am not questioning you.

Q. You were then asked this question:

"Q. Did you hear her testify that Mr. Swidler was introduced as Mr. Swidler?"

You said:

"I did."

In other words, you admitted that you heard her testify that Swidler was introduced as Mr. Swidler. Now, do you remember saying that two years ago?

A. No, I do not. I don't remember it.

Q. Well, now, you are testifying that nine years ago in 1945 you met and you were introduced to this gentleman by the name of Mr. Levenson? That you do remember; am I right?

(150) A. That is right.

Q. But two years ago you cannot remember your own answer, when you were asked the question:

"Did you hear her testify that Mr. Swidler was introduced as Mr. Swidler," and you say you did, and that you can't remember saying?

A. Not quite, no. It is possible I might have said it, but I just don't remember it.

Q. And then again you were asked the question: "Was Mrs. Mandelbaum correct in her testimony?" and you answered, "To the best of my memory, I say I introduced him as Mr. Levenson, to the best of my memory."

And then you were asked this question:

"Q. She did not so remember"—referring to Peggy Mandelbaum—"and, on the contrary, testified that you introduced Mr. Swidler to her as Mr. Swidler; isn't that correct?"

And you answered, "I heard that testimony."

Don't you remember?

A. There might have been too many—at that particular time the name of Swidler and Levenson were bandied around so much that possibly I might have gotten mixed up on it.

A. Yes. possibly.

(151) A. It is very possible I might have gotten mixed up on it.

Q. Do you know a Mr. Brodsky?

A. Jack Brodsky, yes. He is a jobber down in New York.

Q. Do you know him very well?

A. Fairly well from doing business with him.

Q. How long has he been in the textile business, cotton business?

A. Mr. Brodsky has been in the cotton business for many years, cotton and rayon.

Q. He knows his way around Worth Street, the textile industry, would you say?

A. Well, I would say he knows quite a few people and quite a few people know him. I would say so.

Q. You met Swidler there, didn't you?

A. Yes.

Q. How long did you work at the Kaufmann organization?

A. Roughly, about four months.

Q. Now, this transaction that you had with this lady, Mrs. Mandelbaum, did that occur after the transaction with Kaufmann or before? Did you take care of the Kaufmann interests first when they wanted merchandise back in 1945?

A. It is hard for me to remember.

Q. I beg your pardon?

(152) A. I say it is hard for me to remember. It is such a short period there that I was with Kaufmann's.

Q. Well, you don't remember whether first you supplied or you attempted to supply the needs of the Kaufmann organization and then Peggy Mandelbaum or whether it was vice versa?

A. I couldn't remember that far back.

Q. That you can't tell?

A. It is not quite clear in my mind.

Q. You introduced Mr. Swidler to Mr. Kaufmann, didn't you?

A. Yes, as he came in.

Q. Did you introduce him as Mr. Levenson?

A. I believe I did; I believe I did.

Q. You heard Mr. Kaufmann testify when he was here?

A. Yes.

Q. He since has passed away, I undersetand.

A. So I understood.

Q. You heard Mr. Kaufmann testify in court two years ago, and as a matter of fact, you say you were present when the money was given back?

A. Yes, yes.

Q. Now, do you remember Mr. Kaufmann saying that in his office, Mr. Swidler came in there, that the telephone girl in the waiting office announced that Mr. Swidler was coming in? (153) Do you remember that?

A. No, I don't remember that, no.

Q. Well, I mean that was so ——

A. I might not have ever been in that part of the office. They had a big office there. The telephone girl was outside, I believe.

Q. No, no, no. I am asking you if you remember sitting in the courtroom and you heard Kaufmann testify—page 95, if Your Honor please. Here is the question that was asked Mr. Kaufmann, your former boss:

"Q. Where was Mr. Simon at that time when Mr. Swidler called?"

Mr. Kaufmann answered then:

"A. I don't recall whether he was in the office or whether he wasn't, but the switchboard operator announced that a Mr. Swidler was outside waiting to see me."

Now, don't you remember that?

A. No, I don't. She wouldn't announce it to me.

Q. Maybe I don't make myself clear.

A. Maybe you don't. Maybe I don't quite get it.

Q. You are sitting in the courtroom back there.

A. Yes.

Q. Mr. Kaufmann is on the stand.

(154) A. I thought you were referring to what happened in the office there. You are referring to the testimony of Mr. Kaufmann?

Q. Yes.

A. I don't remember Mr. Kaufmann saying that. He might have said it, but I don't remember.

Q. That doesn't awaken any memory to you?

A. No.

Q. Would you say, if Mr. Kaufmann said that, that from what you know of Mr. Kaufmann, he probably was testifying correctly?

A. Oh, definitely, I believe so.

Q. There is no question about that?

A. There is no question about his integrity, none whatsoever.

Q. And, as a matter of fact, Mr. Kaufmann was asked this question on the same page, page 95:

"Q. Do you recognize Mr. Swidler?

"A. Yes, sir.

"Q. Is this Mr. Swidler sitting alongside of me or next but one to me?

"A. Yes, sir."

And then Mr. Kaufmann was asked this question:

"Q. And you are sure that Mr. Swidler was not accompanied by anyone else?

(155) "A. Yes, sir."

Now, you say that you were in their presence when the refund was made?

A. I was called in, yes.

Q. Yes, but Mr. Kaufmann said that when Mr. Swidler came in he wasn't accompanied by anyone.

A. Well, I never said he was.

Q. Well, were you inside there?

A. I was called into the office.

Q. By whom?

A. I believe by Mr. Kaufmann.

Q. By Mr. Kaufmann?

A. Maybe the telephone operator might have called me to tell me to come into his office. That is a long time back for me to remember those small details.

Q. Well, now, tell me this: Did Mr. Swidler ever give you any money?

A. No, sir.

Q. Did this Peggy Diamond or Mrs. Mandelbaum ever give you any money?

A. No, sir.

Q. Am I correct in saying that Peggy Diamond or Mrs. Mandelbaum did not sell any merchandise to Kaufmann for that particular (156) period?

A. I wouldn't know.

Q. That you wouldn't know?

A. I wouldn't know anything about that.

Q. Do you say you were in the office when Swidler was announced by the telephone operator to go in to see Mr. Kaufmann?

A. I was in the office. I don't know where I was, but I was in the office, yes.

Q. Do you remember Mr. Kaufmann saying this in your presence in this courtroom:

"Q. Was Mr. Simon in the room at that time?

"A. When Mr. Swidler came to the office?

"Q. That is right."

That is the Assistant District Attorney asking the questions, page 105.

Mr. Kaufmann said then:

"A. I don't think so. Had he been, I would have called him into my office.

"Q. As I recall your testimony under cross-examination,

you said that the telephone girl announced that Mr. Swidler and Mr. Simon were there.

"A. Not Mr. Simon.

"Q. Not Mr. Simon?

"A. Mr. Swidler."

(157) Now I ask you, was Mr. Kaufmann correct in that statement then in your presence?

A. I can only tell you what I repeated before, and I remember I believe I was called in by Mr. Kaufmann to witness the returning of the money.

Q. Would you say, therefore, you are not sure; it may be that you were not?

A. I am not sure. I was in there. I was called in when the money was given. That I know because I saw it.

Q. Well, now, let us get back to the first time you met Mr. Swidler. You say you met him in the cafe?

A. I think that is correct.

Q. In New York?

A. That is right.

Q. You had never known or heard of him before?

A. Never.

Q. And you have been in the textile business many years; is that correct?

A. That is right, yes, sir.

Q. Who introduced you to him as Mr. Levenson?

A. I know I met him in the cafe the first time.

Q. You said that.

A. I might have been with Mr. Brodsky or someone else. I (158) don't remember who it was. I believe Harry Meyer was with me, the buyer. That I am sure of. I was in the market with the buyer of Kaufmann's, Harry Meyer.

Q. You are positive, you are absolutely positive, that the man who introduced you to him said, "This is Mr. Levenson"? That you are positive; is that right?

A. I think I am right there.

Q. I mean, that you are positive, but as to who introduced you to him you are not positive—as Mr. Levenson.

A. I said before I thought it might have been Mr. Brodsky. I might have gone in there for lunch or a sandwich or a drink at the bar. I don't remember. It is a long while ago.

Q. Do you remember where the bar was?

A. Yes, right at the corner of White Street and Church.

Q. White Street and Church?

A. The Needle and Thread, that was the name of the bar, at that particular time.

Q. Is that near Mr. Brodsky's place?

A. That is correct.

Q. You testified two years ago, and then you were first asked this question by the District Attorney on page 121:

"Q. What name did he use when he first met you?"

Referring to Mr. Swidler.

(159) You said then:

"A. To be honest with you, I don't remember. It was either one or the other."

Now, that was your first reply. Would you say that that represents a better recollection than today? In your first reply to that first question by the Assistant District Attorney you said, "To be honest with you, I don't remember, It was either one or the other."

Now, what makes you so positive today?

A. I didn't say I was positive today.

Q. I beg your pardon?

A. I didn't say I was positive. You said I was positive just now. I didn't say it; you said it before.

Q. Well, maybe I am wrong. In other words, you are not positive that he was introduced to you as Mr. Levenson—today—I mean nine years ago.

A. It could have been one or the other.

Q. It could have been?

A. It could have been one or the other.

Q. Now, in all fairness, the Assistant District Attorney prodded you and asked you the following question:

"Q. Why don't you remember?"

And you said, "I believe it was Levenson. I won't (160) say sure."

Then you were asked by the Assistant District Attorney, so we have a complete picture:

"Q. Did he use both the names Swidler and Levenson as you knew him in 1945?"

You said then two years ago, "I don't know."

"Q. What did you call him? By what name did you call him?

"A. Levenson, I believe."

That was the way you put it two years ago.

A. I believe that is what it was.

Q. I therefore suggest to you, is it possible that with all the talk we have heard about Levenson and Schwartz and different people talking to you about the case since it started, is it possible that there may be an honest confusion in your mind as of today and you cannot state as a fact to the jury how he was introduced to you at that time?

A. There is a possibility.

MR. LEES: I object, because there has been no testimony about Charles Schwartz.

THE WITNESS: I don't know any Schwartz.

MR. KOSSMAN: I didn't even talk about Schwartz.

THE WITNESS: You just mentioned the name Schwartz.

(161) MR. KOSSMAN: Well, I am sorry.

THE COURT: I will sustain the objection.

MR. KOSSMAN: Did I say Schwartz instead of Levenson?

MR. LEES: You said them both.

MR. KOSSMAN: I will withdraw the question and I will put it this way:

BY MR. KOSSMAN:

Q. With all this talk about this particular case, is it possibe that you today cannot honestly tell the jury—and that is all we want is your honest testimony ——

A. I will give it to you as well as I can.

Q. —whether he was introduced to you as Levenson or whether he was introduced to you as Mr. Swidler?

A. There is a question in my mind now. There is a question in my mind right now.

Q. Well, now, Mr. Simon, goods were very hard to get; is that correct?

A. Quite right.

Q. We had to have priorities; is that correct?

A. I believe so.

Q. Is Kaufmann's Department Store one of the largest organizations of its kind in the country?

(162) A. It is one of them.

Q. A couple of hundred millions dollars a year business?

A. Oh, yes.

Q. They had trouble getting it; is that right?

Q. Quite right.

Q. You needed a priority to get the goods; is that right?

A. I don't think the department stores bought on priority.

Q. They didn't have the priority, but you needed the priority?

A. People that had merchandise needed priorities to get them, yes.

MR. KOSSMAN: That is all.

RE-DIRECT EXAMINATION.

BY MR. LEES:

Q. Mr. Simon, the first question that you were asked on cross-examination was, did you read your testimony at the last trial to refresh your recollection.

A. At the last trial?

Q. The last trial, and your answer was that you did.

A. No, I did not.

Q. I show you the notes of testimony of the last trial. Did you read these?

A. At the last trial, no, sir. Nobody showed me anything.

(163) Q. You read this (indicating), didn't you?

A. Yes, I did.

Q. It is a statement that you gave to Special Agent Shipley.

A. I believe that was it, yes.

Q. And that was given when?

A. I don't remember the date.

Q. Sometime before the last trial, wasn't it?

A. Yes, yes, yes.

Q. If I were to tell you ——

MR. KOSSMAN: Just a moment. I am not so sure you can tell him.

MR. LEES: I haven't finished the question.

MR. KOSSMAN: All right.

BY MR. LEES:

Q. Is this your signature, sir?

A. Yes.

Q. Will you read the date that appears next to your signature?

A. The 6th day of January, 1949.

Q. Is that when you were first interrogated, you gave a statement to Mr. Shipley?

A. Yes.

Q. Was your recollection better in 1949 or in 1954?

(164) A. Of what went on in this case?

A. Yes.

A. I guess in 1949.

Q. Have you given us your honest recollection here today?

A. I definitely did.

Q. Did you testify your honest recollection in 1952?

A. Definitely, honestly.

BY THE COURT:

Q. What is your honest recollection as to how you introduced the defendant here to Miss Diamond, Mrs. Mandelbaum? What is your recollection as to what name you introduced the defendant by to Miss Diamond, as she was known in the trade?

A. I am somewhat confused, Your Honor.

Q. I know you are.

A. I am confused.

Q. What is your recollection?

A. I thought I introduced him—Mr. Levenson—as Mr. Levenson.

Q. Do you remember the court taking you to task about not guessing two years ago?

A. Yes, sir.

Q. Do you remember me saying to you, "Let us get straight talk here"?

(165) A. Yes, sir.

Q. I asked you, "You introduced the defendant in this case, David Swidler, to Miss Diamond as Levenson?" and your answer was "Yes, sir."

A. Yes, sir.

Q. You said that two years ago?

A. Yes, sir, I remember that.

Q. All right. Now, are you confused? All that any witness can give Mr. Kossman is his best recollection, and certainly we don't want to have any defendant in this court hurt. We just want your best recollection as to the name under which you first knew this defendant.

A. As I said before, Your Honor, I am confused now, definitely confused.

Q. You are confused now?

A. My recollection two years ago probably was better than today, and if I said Swidler then, maybe it was Swidler, but I am confused.

Q. You are confused now? You didn't read your testimony before you went on the stand today? You didn't read these notes of testimony?

A. Oh, no.

Q. It wasn't furnished to you by the United States Attorney (166) so that you could refresh your recollection?

A. No, sir.

THE COURT All right, that is all.

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(247) P. DIAMENT.

CROSS-EXAMINATION.

BY MR. KOSSMAN:

Q. You talked to the agent this morning, Mr. Shipley, before you testified?

A. Did I talk to him?

Q. That man there sitting in the center.

A. Yes, I said hello to him. As a matter of fact, I didn't recognize him.

Q. Did he go over your testimony with you, what you said last time?

A. He showed me papers. I didn't read it, no.

Q. Did he ask you to change anything that you said last time?

(248) A. No, not to my knowledge.

Q. Then why do you come in this morning in court and when the assistant district attorney asked you what name Mr. Swidler was introduced to you, you said Levenson?

A. That is right.

Q. Well, now, I refer to page 111, two years ago. Your memory was better two years ago, wasn't it?

A. Right.

Q. You were asked this question by the assistant district attorney two years ago:

"Q. Was he introduced to you by the name of Mr. Swidler or what?

"A. By the name of Mr. Swidler, right."

That is what you said two years ago. Why did you change it today?

A. It is quite possible that I had forgotten at the time, and I remembered meeting Mr. Swidler in my showroom, and introduced to me by Mr. Simon, and when I tried to get him on the phone to come down to the factory, I said, "Tell me, what is your right name? What is your name? Isn't it Levenson?"

He said, "No, Swidler."

When I went up to Kaufmann's to try to find him ——

Q. Please, please, please. Last time you stated in answer to the question—very simple—the assistant district attorney asked you, what name was he introduced to you by, by the name of (249) Swidler or what? You answered then, "By the name of Mr. Swidler, right." That is what you answered last time. Was that right or was that wrong?

A. No, then I made a mistake.

Q. Well, when did you make the mistake? Today after talking to the agent or two years ago?

A. No, I don't remember what I had answered, but I know, if my memory failed me then, it is a little more keen about what has happened, because I suppose I have got to remember every detail that I possibly can. If I remember correctly, I think he was introduced to me as Mr. Levenson.

Q. That is what you say today.

A. I believe so, right.

Q. I mean, you say that today.

A. Yes.

Q. But two years ago you said he was introduced to you by the name of Swidler.

A. Then I knew him as Mr. Swidler and probably forgot that he was introduced to me as Mr. Levenson. I had no ulterior motive in my mind.

Q. I can only put it to you this way: Do you prefer me calling you Mrs. Mandelbaum or Mrs. Diament?

A. Diament.

Q. You were aksed this question two years ago by the (250) assistant district attorney:

"Q. Was he introduced to you by the name of Mr. Swidler or what?"

You answered then, "By the name of Mr. Swidler, right."

That is what you said. Then you talked later on about Mr. Swidler came in the following day, and so forth. Now, today you come into court, and after you spoke to the agent this morning, and when the assistant district attorney asked you what name was he introduced to you by, you said Mr. Levenson.

A. Yes.

Q. That is two years later?

A. Yes.

Q. Now I am asking you, was it suggested to you by the Internal Revenue agent? Did he mention the word Levenson this morning to you?

A. No. I happened to glance at the paper, but that still wouldn't make any difference because I didn't remember whether he was introduced to me as Levenson or Swidler. If I remember correctly, he was introduced to me as Mr. Levenson, and I got to know him as Mr. Swidler after I tried to locate him and couldn't.

Q. But two years ago when you testified—and I won't ask (251) you this any more—you said that he was introduced to you by the name of Mr. Swidler. There is no doubt in your mind that is what you said then?

A. Yes, what the statement is in there I probably did.

Q. Have you talked to Mr. Simon about this case?

A. Since when?

Q. Any time.

A. You mean up to the time that this started two years ago?

Q. Any time.

A. You mean the case that is going on now?

Q. Yes.

A. No, sir.

Q. Well, did you talk to him when the case first came up?

A. You mean after we came to Philadelphia? I haven't seen Mr. Simon.

Q. Two years ago.

A. Within the two years? No.

Q. Wasn't Mr. Simon in court when you testified last time?

A. Yes, but I did not speak to him.

Q. You testified that when you called the Levenson number you didn't get an answer; is that right?

A. Right.

Q. You weren't told that there was no number?

A. I don't remember that, whatever it was. I know I didn't (252) get an answer.

Q. This girl from Kaufmann, is that how you indirectly met Mr. Swidler?

A. I met Mr. Swidler through Mr. Simon, who at that time was the piece goods buyer for Kaufmann's.

Q. You did some business with Kaufmann.

A. Yes, we sold ——

Q. Were you in the room when Mr. Kaufmann was testifying last time two years ago?

A. I don't think I was in the room at the time. I don't believe I was in the room at the time.

Q. Did you ever ask Mr. Swidler whether he was Mr. Levenson?

A. I don't remember. I really don't.

Q. Was it your impression that Mr. Swidler had the merchandise and was in control or that he was getting it through some other source?

A. No.

MR. LEES: I object. We are not interested in impressions.

THE COURT: I will let her answer if she is able to.

THE WITNESS: No, I was just doing business with this gentleman. I knew of nobody else. I was just doing business with Mr. Swidler. I didn't know of anybody else.

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(490) DANIEL K. SHIPLEY, resumed.

CROSS-EXAMINATION.

BY MR. KOSSMAN:

Q. Mr. Shipley, do you have any extra or special interest in this case that would prevent you from giving the full story

that would be just as favorable to the defendant as to the Government?

A. I don't quite get the question. I think I understand what you mean, but would you read the question, please?

(The last question was read by the reporter.)

A. I have no special interest in the case.

Q. You testified in court two years ago, didn't you?

A. Yes, sir.

Q. This testimony that you related today concerning your interview with Mr. Swidler, do you consider that important in this case?

A. Well, it was a question asked me. I had to answer.

Q. I am asking you, do you consider that testimony important?

(491) A. I am not the judge. I don't know what is important.

Q. Well, did you testify two years ago in court concerning this interview as you have today?

A. No, sir, I was never asked.

Q. You are the investigator. You sat beside the District Attorney last time, didn't you, two years ago?

A. I can't sit beside him when I am on the stand and tell him what to ask me.

Q. Did you tell the District Attorney to ask you questions about the interview?

A. This time or the last time?

Q. Last time.

A. I did not. He had access to my complete report in the case and he didn't ask me. This man did.

Q. He didn't ask you and this man did ask you?

A. Yes, sir.

Q. Was there any discussion between you and the Assistant District Attorney two years ago as to why he didn't ask you these questions?

A. No, sir.

Q. Were you surprised that he didn't ask you two years ago?

A. Yes, sir.

Q. You were on the stand several hours. You made no attempt (492) to have the Assistant District Attorney ask you these questions?

A. No, sir.

Q. About the interview?

A. No, sir.

Q. All right. Now we will come to the interview. Am I correct in saying he attended this interview without a lawyer and voluntarily?

A. Without a lawyer what?

Q. And voluntarily. I am referring to the one in the Ayer Building when he came down to see you.

A. Not voluntarily. I had discussed it with him.

Q. Let us put it this way: Did you issue a subpoena?

A. Oh, no, he wasn't subpoenaed.

Q. Did he come down voluntarily?

A. When you say "voluntarily", I accept that he initiated the coming down. He did not initiate the coming down. He came down without force.

Q. He came down at your request?

A. Yes, sir.

Q. Without any process being served upon him?

A. Yes, sir, he did.

Q. You told him then, referring to Question 3—by the way, there are about 250 questions—you told him then,

(493) "Although I feel that you are aware of your constitutional rights, I should advise you that you are not compelled to answer any questions. If you do answer and the answers incriminate you, the Government may or may not use those answers against you in any civil or criminal proceedings that they may decide. Did you understand that?"

He said,

"Yes."

So you told him about that?

A. Yes, sir.

Q. And he proceeded, after you said that, to answer I think 250 questions; is that correct?

A. Yes, sir.

Q. By the way, did you read this report since you got off the stand, in between?

MR. LEES: Don't answer that.

MR. KOSSMAN: Why not?

MR. LEES: I want to talk to the Judge.
May I speak to Your Honor, sir?

THE COURT: He can answer that yes or no.

MR. KOSSMAN:

Q. Did you or did you not?

(494) MR. LEES: I would rather speak to Your Honor first, if I could.

MR. KOSSMAN: I will withdraw the question.

MR. LEES: No.

MR. KOSSMAN: I will withdraw the question. Are you going to tell me I can't withdraw the question?

THE COURT: I see no harm in answering the question yes or no, Mr. Lees. I can see no possible harm in his answering yes or no, because I can see absolutely nothing improper if he did read it.

THE WITNESS: What is the question?

MR. KOSSMAN: I will withdraw the question.

BY MR. KOSSMAN:

Q. You asked Swidler at that time where he lived; is that correct?

A. Yes, sir.

Q. By the way, this was in 1949, January 12, 1949?

A. Yes, sir.

Q. And he told you, that is, referring to 1945, that for two years previous to that he had been living with his in-laws at 33rd and Clifford Streets? Do you remember him saying that?

A. Yes, sir, I do.

Q. You asked him what education he had. He told you he was a (495) pharmacist—grammar school, high school, and a pharmacist; is that correct?

A. Yes, sir.

Q. Graduated 1926, and you asked him then if he had filed income tax returns throughout the years, and he told you he did; was that correct?

A. He told me he did when it was required, something about when it was required.

Q. His exact answer was,

"Every year where it was necessary."

A. Yes, something like that, that is right.

Q. You asked him if he prepared his own return, and he told you he never prepared his own return. Do you remember him saying that?

A. I recall he said somebody up around City Hall, or something like that, had prepared his returns for him.

Q. Well, he said a Mr. Cogan at the National Bank Building. That was his answer. The National Bank Building is around City Hall, but he didn't say someone around City Hall.

A. I knew that the building that he referred to was near City Hall.

Q. There is a different inference.

A. I intended no inference, counselor.

(496) Q. You showed him his income tax return for the year 1944 and he identified it; is that right?

A. Yes, sir.

Q. You showed him his income tax return for the year 1945 and he identified it, then you showed him the various partnership returns and he identified his signature; is that correct?

A. Yes, sir.

Q. Now, I notice there are some pencil marks here. Are these pencil marks made by you?

A. Yes, sir.

Q. You testified on direct examination this morning that when you came to visit him he gave you all the records; is that right?

A. He gave me all he had. That was all he had. He told me that was all he had.

Q. You will forgive me if I skip around on some of these questions. You testified today—the Assistant District Attorney asked you this question—now listen very carefully:

"Q. Did you ask him about Samuel Cohen?"

Your answer this morning:

"A. Yes, I did. I asked him if he ever had any business transactions with Samuel Cohen, because there was a loan appeared on the Mothercraft books of $7500 to Cohen, and he said that he had loaned him some money (497) and that it had been repaid within about three weeks, and as I inquired the occasion of the loan and the detail of the loan, he told me that was none of my business, all I should be concerned about was the loan was paid off in the books, what it was for or why it was done was none of my business."

That is what you said this morning.

Now, I suggest to you, in all fairness, that this was the question you asked him and this was his answer five years ago:

"Q. Now, in checking your accounts and shipments, and so forth, we ran across the Bridgeport Luggage Company. Did you have any business transactions, other than a loan, with the Bridgeport Luggage Company?"

That was the question that you asked Mr. Swidler when he was sitting in your office. Do you remember asking him that?

A. Yes.

Q. Now, you have testified how he answered. Now I have the original record. This was his answer then to that question:

"A. No. I have had—Mr. Cohen's a friend of mine and he called me one day and was short of some money and asked for a loan—I think it was $7500—which he paid back a few weeks or a month later."

(498) Is there anything there about it is none of your damned business?

A. No, sir, nothing there in that statement.

Q. I beg your pardon?

A. There is nothing in that statement there about that.

Q. Is there anything in any statement here?

A. Not in your notes.

Q. Weren't you referring to the ——

A. No, you are confused, counselor. That statement in your hand was made on January 12, 1949.

Q. Yes.

A. The time that the taxpayer told me that it was none of my business about the loan was on April 2, 1948, in his offices.

Q. Well, I refer you to today's testimony that you started, and you were asked, "Did you talk to him on another occasion?"

"A. I did.

"Q. When was that?

"A. On January 12, 1949."

You talked to him once in April, 1948, and then ten months later?

A. Yes.

Q. Now, you talked about after you completed a field examination you sent out a letter to the taxpayer giving him an (499) interview, a time to come in, and in pursuance of that procedure Swidler was invited in the office, and on that occasion this discussion follows.

A. If it is, there is somebody mixed up, because I have a record of the interview that I had with him wherein he said that, and it was on April 2, not January 12. If you read from that record you have there, the question was asked me about the two days of interview, April 2 and January 12, and then those questions follow. There doesn't seem to be any distinguishment there as to particularly which time that particular interview took place.

Q. Well, but I suggest that you did ask Mr. Swidler about this loan for 1949.

A. On both occasions I believe I asked him.

Q. Oh, on both occasions?

A. On both occasions I asked him.

Q. But on one occasion you now say—do you have a stenographic report of the first one?

A. I have it in my own handwriting that I wrote immediately after it took place.

Q. Do you have a stenographic report of the conversation you had with Mr. Swidler at the first time?

A. Not a stenographic report. I have contemporaneous memoranda (500) on it, though.

Q. There was a previous question by the Assistant District Attorney:

"Q. I take it at this stage of the game when you talked to him you had learned a great deal about the taxpayer; is that right?"

Your answer was,

"Oh, yes."

Now, is it your contention that when he asked you about Samuel Cohen, you were now talking about what he said in 1948, you weren't referring to 1949, and that is the reason

you said he told you there it was none of my business, but it is not in here; is that your contention?

A. I don't understand the question, counselor.

Q. I will withdraw the question, then.

Now, do you remember you asked him about the suppliers?

A. Do I recall the question that I asked him about suppliers?

Q. By the way, how many pages, so that I can guide myself in the future, is that original thing? Is it as many as this or is it relatively smaller, if you remember?

A. What original thing? What do you mean by the original thing?

(501) Q. The original memorandum that you made.

A. The one that I made in my own handwriting?

Q. Yes, the one that you made in your own handwriting.

A. As I recall, it is about, oh, possibly three pages of handwriting.

Q. You never typed them up?

A. Yes, sir, it was typed up.

MR. LEES: It is the paper I offered to you that you said wasn't worth the paper it was written on, and you objected when I handed it to you.

MR. KOSSMAN: Well, I am going to ask the Assistant District Attorney to take the stand and testify.

You know why I told you it wasn't worth the paper it was written on.

MR. LEES: No, I didn't.

THE COURT: Gentlemen, we have had all that we are going to have of this repartee in this trial. It stops now.

MR. KOSSMAN: I am sorry, Your Honor.

BY MR. KOSSMAN:

Q. Now, do you remember you testified this morning that you asked him if he ever sold any merchandise to Einhorn Brothers and he said no?

A. Yes, sir.

(502) Q. That is what you said, no question about that? You said it this morning.

A. Yes.

Q. Do you want to change your answer?

A. No. I might like to amplify it.

Q. Here was the question that you asked him in 1949. You asked him then:

"Q. Did you ever deliver the invoices to Einhorn's for merchandise sold in the name of Mr. Levenson or Mr. Schwartz?"

He answered then,

"I may have. I have often been over there to view merchandise that he had for sale and I may have turned over an invoice to him for goods."

Do you remember him testifying that way?

A. Yes, sir.

Q. He did testify that?

A. Yes, sir.

Q. Do you remember you asked him then, back in 1949:

"Q. Did you ever receive the checks in payment of this merchandise sold to Mr. Einhorn by Levenson or Schwartz?"

Do you remember what he answered then?

(503) A. I think he answered that he may have picked them up and passed them on, on a couple of occasions, and I think he cites that there was some trouble with some outfit in New York or something that he acted as intermediary in returning a check or something.

Q. He did state as follows:

"A. I think on a couple of occasions he did give me the check to turn over to Mr. Levenson. I think he told me he had sent a check to New York and had it returned * * *."

That is referring to your trouble there, I guess, in New York.

Now, you asked him this question:

"Q. Any of these checks that you received from Mr. Einhorn in payment of merchandise invoiced to him from J. Levenson or Charles Schwartz—did you ever cash any of those checks yourself?"

Do you remember that?

A. Yes, sir.

Q. And he answered at that time:

"Personally, no."

A. It could be.

Q. I assure you I am reading correctly from here.

(504) Now, you asked him this question:

"Q. Did you ever receive any monies from any person cashing checks in the name of Charles Schwartz or J. Levenson?"

Do you remember what he told you then?

A. I think he said that he didn't receive any monies.

Q. Absolutely not.

Did you ask him at that time whether he ever represented himself to be Schwartz or Levenson?

A. I think I did ask him that question.

Q. How did he answer it?

A. I think that he said that he never misrepresented himself that way, but that he had been in the company of Levenson, and some people may have made a misinterpretation, or words to that effect.

Q. All right, now, in answer to the question,

"Have you yourself ever used the name J. Levenson or Charles Schwartz in any of your business transactions? Did you ever represent yourself to be Charles Schwartz or J. Levenson?"

Mr. Swidler replied:

"No, I did not."

That was his answer.

(505) A. Well, isn't there more to it than just that?

Q. Well, I will show it to you.

Now, this morning you were asked:

"Q. Did you ask him if he ever used the name Levenson or Schwartz?"

Probably that is why it is in your mind.

"A. I did. He said no, but that he may have been mistaken for one of them because he had been with Levenson."

You see, you said today that that is the way he answered at that time.

A. Well, I think, counselor, some place in that statement you have in your hand there is an answer like that.

Q. It may be, it may be. I just got this an hour ago.

Now, you did say to him this morning, you were asked this question:

"Did he say anything about Bill Stein?"

Your answer was:

"I don't believe I mentioned the name Bill Stein to him."

That was your answer this morning.

Bill Stein, of course, is Steintex; is that correct?

(506) A. Yes, sir. I did ask him about Steintex.

Q. You asked him last time:

"Q. Can you name some of the companies that you interceded for the jobbers in making the piece goods purchases?"

You asked him for names. He said:

"Steintex Fabric."

Do you remember him saying that?

A. He answered, I think, three firms. Firms, not individuals, counselors. You asked me about William Stein. Now you are asking me about the corporation, or Steintex. I take that as a different question.

Q. He answered:

"Steintex Fabrics, Fairmount Fabrics, J. Levinson;" is that correct?

A. I believe that is correct.

Q. Isn't it a fact that when you looked over his books of

account you found he purchased from J. Levenson and Charles Schwartz?

A. Yes, sir, there were invoices from Charles Schwartz and J. Levenson.

Q. More particularly in reference to that check, when he signed the check as a maker instead of ——

(507) By the way, there were thousands of checks; am I right?

A. There were quite a few.

Q. I see this number is 2736.

A. There were a volume of them.

Q. Now, this check that has been introduced into evidence where he signed the name Charles Schwartz ——

MR. LEES: Whom are you talking about when you say "he"? Keep the record straight.

Q. Mr. Swidler signed the name of Charles Schwartz instead of his own name for Mothercraft and it cleared through the bank. You saw that at that time; am I right?

A. Yes, sir.

Q. Did you see the invoice at that time for that particular thing and does it correspond to the check?

A. This is No. 4115. I know the voucher section of the check said 4125. It was a little different, but I think that is the same one. I think that is for that invoice.

Q. Isn't it for the same amount of money?

A. Yes, but this would throw you off, because the number over here on the voucher section is 25 instead of 15, but it is the same amount, certainly the same amount.

Q. Well, look over here. Doesn't it say "Invoice" on top, (508) 4125?

A. Oh, yes.

Q. Was there any special reason why, when you testified this morning, you didn't use these notes but you trusted to your memory?

A. Why, the District Attorney had them.

Q. I beg pardon?

A. The District Attorney had them. You mean that statement that Mr. Swidler made?

Q. Yes.

A. Well, the District Attorney had them.

Q. Now, do you remember you asked Mr. Swidler why did he go around on these different transactions, or whatever they were, why did he do it, why did he go to these people and do this thing? Do you remember asking him that?

A. I don't recall that question, counselor.

Q. Didn't you ask this question of Mr. Swidler back in 1949?

"Q. Did you ever sell any goods for Levenson yourself or were you concerned in any sale with Levenson?"

He answered then:

"Yes."

Am I right?

A. I believe that is correct.

(509) Q. He said:

"I am a member of the Philadelphia Waist and Dress Manufacturing Association, and we would sometimes sell sell or trade, or refer him to somebody, if anyone was interested, and in that way, if he made a sale, he would usually reduce our price to us."

Do you remember that?

A. Yes, sir, I remember that answer.

Q. Do you remember you asked him:

"Q. He wouldn't give you any direct commission?"

And he said:

"No. I have never received any monies for the company nor for myself other than a lower price."

Do you remember that?

A. I remember him saying that, yes, sir.

Q. Now, you saw the bills, didn't you? You saw the invoices from Charles Schwartz and Levenson there, didn't you?

A. Yes, sir.

Q. Do you remember what the price was that Schwartz billed this merchandise to Swidler, Mothercraft?

A. Offhand, I don't without seeing it. I wouldn't recall.

Q. Well, would you say it was less than the price that was charged to Diana Stores, Kaufmann, Einhorn, Bader-Diamond, and (510) the others?

A. I can't recall, but I would assume it would be less.

Q. Well, suppose I suggest to you that the price was 30 cents.

A. Well, let me see an invoice and maybe I can recognize it.

Q. All right, as of January (handing).

A. Yes, they are billed at 30 cents a yard.

Q. Another one (indicating) at 40 cents; am I right?

A. Yes, sir, that is what this says.

Q. Do you think I made these things up today or were they present when you picked them up?

A. No, from this writing, which I seem to recognize, I think they were there when I looked at them in 1948.

Q. And without going through all these things, am I correct in saying the general price range of goods sold to Mothercraft ran into 30 cents and 40 cents, just above the mill price at that time?

A. Well, those two that you showed me, and I don't recall the others. I think there was some variance that some of it was higher than that, as I remember.

Q. Yes, there is 45 cents, there is 32½ cents, but it wasn't a dollar a yard, was it?

A. Oh, no.

Q. This is Question 225:

(511) "Q. When you took an order for goods, did you give an invoice?"

I will tell you what his answer was then, to save time:

"A. Well, I wasn't a salesman. I would just perhaps see what the other fellow had, and if he had something I could use or I had something he could use, it would be either a

trade or a difference in payment made. We were doing quite a bit of trading in goods at that time—all of us."

Now, the next question you asked was this:

"Q. Just take an instance:

"Say you had a swatch of goods you were showing, and the material, as you say, was for this fellow Levinson or Schwartz, and you say you took a few orders for him. When you took that order did you give an invoice for the merchandise that was ordered or have anything to do with it beside taking the order?"

Do you remember his answer then?

A. No, sir, I don't recall his answer.

Q. Well, he answered then, Mr. Swidler said, referring to Levenson or Schwartz:

"A. He always issued an invoice for goods pur- (512) chased from him or I wouldn't have bothered with it. It was strictly ——"

Now, you asked this question:

"Q. Did you ever present the invoice to the purchaser?"

Do you remember his answer then?

A. No, sir, I don't recall.

Q. Well, he said:

"I may have on some occasions."

Did you ask him then if he received the checks for the merchandise on that invoice, do you remember?

A. I think I did ask that question.

Q. What did he say?

A. I think that he said that he may have on some occasions and passed it on to Mr. Levenson or Schwartz.

Q. Was that the impression that you gave this morning or did you give the impression to the jury that he never got any of the checks?

MR. LEES: Well, I think I will object to the impressions.

THE COURT: Sustained.

BY MR. KOSSMAN:

Q. Now, did you ask him this question, whether he cashed the (513) checks and got the cash money?

A. I think I did ask him.

Q. And he said:

"Personally, I did not."

I went over that before.

Now, you asked him this question:

"Q. Did you ever accompany anyone cashing those checks?"

Do you remember what he answered then?

A. I think he answered no, but I am not certain.

Q. He answered:

"Again I feel I would—it would tend to implicate me to answer that question."

You asked him:

"How?"

I am going back to 1949.

He said:

"Because I have never received any profit from this other than getting a lower price for the goods purchased from Levinson, and I don't feel as though I should involve myself in this thing."

You then said to him this:

"Q. If you didn't receive any income I agree (514) with you that you are not involved in it. Just accompanying a man getting a check cashed doesn't give you an income. I can't see how it involves you as an income tax liability."

That was your statement.

To save you time I will read the answer rather than ask you if you recall.

"A. Neither do I, but I don't know the law. But I'm not represented by an attorney here. I came of my own free will to answer the questions put before me and I'm answering to the best of my ability and I'm trying to cooperate in

every way except where a question would tend to implicate me."

Do you remember his answer?

A. No, it is quite an involved answer.

Q. You will admit that I am reading ——

MR. LEES: I am going to object, sir.

I think that there is no reason to get the statement in this way.

THE COURT: I will overrule the objection.

MR. LEES: Very well, sir.

THE COURT: Proceed.

BY MR. KOSSMAN:

(515) Q. Now, you asked him this question, and to save time, rather than ask if you remember it, I am going to read his answer. Here was the question. You asked him then:

"Q. Suppose I ask a few simple questions which might settle that issue. Any of these checks that you received from purchasers of merchandise, which checks were made payable to Charles Schwartz or J. Levinson—did you receive any income from these checks?"

He answered then,

"I absolutely did not. Every one was turned over to Levinson.

"Q. Did Levinson pay you anything for this service, or Schwartz?

"A. The only thing that was received was by Mothercraft, and that was a lowering in price on the merchandise.

"Q. How much?

"A. Which you could readily see yourselves if you checked prices against the prices I paid. If the other party

would pay sixty cents for a yard, I was charged fifty cents for a yard * * *."

Q. Question 236:

"Well, just take your example: When yard (516) goods, we'll say, was sixty cents a yard, and you got that same goods for fifty cents a yard, which I believe you just explained ——

"A. Yes.

"Q. —how would you carry that on your books? Would you carry that as fifty cents a yard and ten cents discount, or would you carry it as fifty cents as the cost?

"A. No. I was billed at the lower prices.

"Q. Then the market price didn't enter into the transaction as far as your books were concerned?

"A. That's true."

You put it this way. Listen carefully.

"Q. Well, actually weren't you getting, as you say, sixty-cent goods at fifty cents in exchange for your services or help or assistance? You might say you were actually getting ten cents a yard ——"

Do you remember saying that to him?

A. I may have.

Q. Well, is it your conception under the income tax laws—you are an investigator—that a transaction like that results in tax liability?

A. Well, my reason for asking questions as an income tax (517) investigator is to determine the true facts. If he is not liable for the income and the income is going to somebody else, or there is a commission income, I try to make a factual determination so that his liability can be established and the other fellow's as well.

Q. Do you remember you said this to him, in the form of a question, No. 239:

"Q. I want you to give me every bit of information, Mr. Swidler, for this reason. This will be your last and only opportunity to make any explanation you wish to the Government of the circumstances surrounding your income tax

liability. When we finish this interview today, you will have no subsequent opportunity, as far as I'm concerned, to express costs or circumstances that you were involved in which may require an explanation. If you have any explanation to make concerning your income tax liability, this is the time and place to make it."

Is that correct?

A. I did tell him that.

Q. Is that a correct statement under the law and the regulations, that this is his last time and opportunity to make any explanation he wishes to the Government of the circumstances.

A. When that statement is included in the report, the report (518) is written, and when it leaves the office, I have no further—it goes forward from our office for processing, and once a report is written I have no further connection with the case. I couldn't give another interview or make an explanation. It would be some place up along the line. As far as I am concerned, that would be the last opportunity, and that is exactly what I said.

Q. But it certainly is not correct to say to an individual—and nobody knows it better than you—that this was his last and only opportunity to make any explanation to the Government.

A. I didn't say that. Read the whole thing, counselor. It changes the interpretation of the question.

Q. This man was sitting there without a lawyer; is that right?

A. At that time?

Q. Yes.

A. Yes, sir.

Q. You said, "I want you to give me every bit of information, Mr. Swidler, for this reason. This will be your last and only opportunity to make any explanation you wish to the Government of the circumstances surrounding your income tax liability. When we finish this interview today, you will have no subsequent opportunity, as far as I am con-

cerned, to express costs or circumstances that you were involved in which may require an (519) explanation. If you have any explanation to make concerning your income tax liability, this is the time and place to make it."

Now, is it your interpretation of this statement that you were only referring to yourself?

A. That is right. I say that; I say that.

Q. Do you think that the taxpayer sitting there could be left under the impression that he couldn't give an explanation to anybody else after you finished? Is that possible?

MR. LEES: I object.

A. Counselor, I don't know what his process of thinking would be.

BY MR. KOSSMAN:

Q. Do you remember at that time the defendant was worried about OPA?

A. Was worried?

Q. Was concerned in OPA prices? Weren't there two agents who came in to see him back in 1946 and 1947 about an OPA price?

A. I don't know. He can tell you. I didn't have anything to do with it.

Q. Were there ever OPA agents concerned in this case?

A. In this case?

Q. Back in 1946, in December. Not this case.

A. I don't know, counselor.

(520) Q. What is that?

A. I do not know of my own knowledge.

Q. Well, didn't you hear the accountant?

A. Yes, sir.

Q. In your presence?

A. He said, "I don't know." He said that.

Q. I said to the accountant in your presence, while you were sitting here,

"When two agents came around from the Currency, Price Stabilization, or some name like that, did you discuss it later on?"

You heard the accountant say,

"Yes, Mr. Shipley told me they were OPA agents."

A. May I explain that to you, counselor?

Q. You can explain anything.

A. When he made his statement to me concerning his preparation of the returns and he gave me that title that these men were Currency Protection Branch, or something or other, I knew that he was in error, that there was no such branch of the Government, to my knowledge, and when he told me what they were inquiring about, I told him it was OPA.

Q. Well, now, when you were speaking to the accountant —Mr. Swidler referred you to his accountant, didn't he, Sol Lavin?

(521) A. (No answer.)

Q. Well, you met the accountant, Sol Lavin?

A. Oh, yes.

Q. You asked the accountant this question about why he didn't sign a certain tax return. Do you remember his answer then to you? He said there,

"I have a note in my paper dated March 7 which refers to a meeting with Mr. Toplan and Mr. Somers, special agents."

So you did know at that time something about OPA?

A. Oh, something about OPA. That is a rather vague question, counselor.

Q. But, as a matter of fact, you didn't even say anything about OPA when you were interviewing him at this interview?

A. What do you mean, I would say anything about OPA?

Q. Did you mention the word OPA? Were you trying to lull him into a feeling that this was no OPA investigation,

he shouldn't be afraid of some transaction over ceiling price during this thing? Do you remember?

A. The questions I asked speak for themselves. You have them right there, and I recall no questions like that. To lull this man, you mean, that it was of no consequence to him? I (522) told him it was an income tax investigation.

Q. I am asking, did you try to tell him that it wasn't an OPA case?

A. I don't know what you are driving at.

MR. LEES: Neither do I, sir. I will object to the question.

THE WITNESS: I told him that this was an examination of his income tax liability. I state that in the fore part of the statement.

BY MR. KOSSMAN:

Q. Did you tell him that this was not an investigation of OPA prices, so he should not be afraid to tell you about a transaction?

A. I may have said that in explanation, yes, sir.

Q. Well ——

A. I don't recall stating it in the way you say, counselor, but I may have done that to show him that I was not concerned in price violations but I was concerned in tax matters.

Q. Now, here is the exact question you asked him.

"Q. Again, let me try to put the idea over to you what this is. This is not an investigation of OPA prices. This has strictly to do with your income tax liability."

(523) Do you remember saying that?

A. That would be very much like ——

Q. Why did you tell him that, if the question wasn't raised that he was worried about OPA? You didn't tell him this was not an investigation of narcotic laws or an in-

vestigation of Federal housing. Why would you tell him this is not an investigation of OPA prices, unless he was worried about OPA ceilings at that time. That is my question.

A. You asked me—would you read that question, please?

MR. KOSSMAN: I will withdraw that.

THE COURT: I suggest you do. If there had been an objection, it would have been sustained promptly.

Suppose we ask questions instead of making statements with conclusions and then ending up in a fifth question. Let us keep our questions straight, Mr. Kossman. That was a very involved question containing four facts. The Court can't follow it quite that fast. I like to follow questions.

MR. KOSSMAN: The Court appreciates that I just received this book.

THE COURT: I appreciate there is always difficulty and pressure in working in the trial of any case, and I try to make due allowance for it.

(524) MR. LEES: I would like to make it clear, sir, that the defendant was able to get one of these things in 1948. We made our copy available at 12:30 at the recess, and he had it from then till 1:25, when I took the first 22 pages back. We are not trying to take any undue advantages of anybody, Mr. Kossman.

THE COURT: Let us get along.

BY MR. KOSSMAN:

Q. Do you remember asking this question:

"Q. Mr. Kaufmann has made a statement regarding the fact that he was reimbursed for that returned merchandise, and has stated the circumstances, and I'm asking you what

you had to do with that return of merchandise or the reimbursement to Mr. Kaufmann?"

He answered as follows:

"A. Well, Mr. Shipley, I think that really was a point at law and I think it would unnecessarily tend to implicate me in this deal."

You asked him this question:

"Q. How? I mean, if you are just an agent for somebody else or performed a service for somebody else, how would that involve you?"

And Mr. Swidler answered as follows:

(525) "A. It happens that it would. It may, rather. It may involve me and I don't care to involve myself in it because I received no remuneration or profit from it, and for me to make a statement like that, I feel that I would, as I said before—it would tend to involve or implicate me in this deal of which I have nothing other than grief of."

You then asked him this question:

"Q. Well, you may construe certain facts that way, but if, as you have told me, you have no involvement in the thing, received no income from it, then I think you are under a misapprehension."

And he answered as follows:

"A. I don't understand that end of the law and I'd rather not answer that question for that reason."

You said to him:

"Q. Well, you mean, because you don't understand the law?"

And he said:

"A. That's true."

Now, you then said to him this:

"Q. That's not a sufficient reason to refuse to answer a question—understanding a law. If you have (526) had any dealings with Mr. Kaufmann's office, I would like to have that information. Now if, as I say, you were acting as an agent for someone and received no income yourself, then I

see no way of you being involved in it. But I want the facts of whose income it was."

Didn't he tell you that it was Mr. Levenson's income?

A. I don't recall that as the answer.

Q. He answered as follows:

"A. Mr. Levenson's income, evidently."

I am only doing it this way to save time.

A. Thank you, counselor.

Q. There are just a few more questions. Do you remember the question:

"Q. You stated that in your opinion you felt that you might incriminate yourself. I have asked you if you make that statement as a result of a conference with counsel and you advised me you did not, that it's your own humble opinion. Now I ask you if those things about which you refused to testify are acts which will incriminate you or implicate you in an income tax liability, your own income tax liability?"

Do you remember his answer to you then?

(527) A. Would you read the question again, counselor?

Q. The question was:

"Q. Well, you are the one whose opinion is being examined."

THE COURT: Whose what? Read that again. You are the one whose opinion?

Q. "Well, you are the one whose opinion is being examined. You stated that in your opinion you felt that you might incriminate yourself. I have asked you if you make that statement as a result of a conference with counsel and you advised me you did not, that it's your own humble opinion. Now I ask you if those things about which you refused to testify are acts which will incriminate you or implicate you in an income tax liability, your own income tax liability?"

Do you remember you asked him that question?

A. Yes.

Q. Now, his answer was as follows:

"A. Mr. Shipley, I think my entire record in business, which you have reviewed from 1944, 1945, 1946, and perhaps back to 1942, when I started in business, proves conclusively that I don't mean to hide anything. I have shown you everything I possibly had that you asked (528) for me to show you. I have gone along and given you all the information I possibly could, and evidently you have found everything satisfactory, other than the questions that you are asking me about."

Do you remember that was his answer?

A. I believe that was his answer.

Q. Now, just a few more questions, because I have to get on. By the way, he described Levenson to you, didn't he, told you what he looked like?

A. Yes.

Q. There are just two more questions I wish to ask you on this phase. Will the Court indulge me for a minute?

Here is the question, No. 246:

"Q. Then why any hesitancy concerning testimony of acts you made for Levinson or Schwartz or Kaufmann or whoever you were making them for?"

Do you remember his answer then?

A. Something to the effect that he didn't get anything out of it and he didn't want to get mixed up in it, something like that.

Q. I will read you his answer then:

"A. Because, as I said before, they might tend to implicate me, and not having received any monies from (529) this, I don't care to answer any questions that may tend to implicate me, not knowing the law and not being represented by a lawyer at this time."

Do you remember he answered that?

A. I believe that is right.

Q. Then do you remember you asked him this question:

"Q. Would you wish to be represented?"

Do you remember how he answered that?

A. No, but it speaks for itself.

Q. All right, his answer was, when you asked him, "Would you wish to be represented?"

He said:

"A. I don't think it's necessary. Everything I have to say is open and above board excepting the few questions that may implicate me or tend to implicate me or incriminate me —whichever the term is."

And then you asked him whether he accompanied anyone to the check cashing agencies when those persons cashed checks made payable to Charles Schwartz or Levenson, and that he refused to answer at that time; is that correct?

A. I don't know whether he refused to answer or whether he said that he himself didn't ——

Q. Well, he refused to answer. He said:

(530) "I do not wish to answer that question."

Now, I suggest to you, wasn't the defendant afraid, as he himself told you at that time, that Levenson, Schwartz, Kaufmann, might tend to implicate him? Didn't he tell you that then?

A. That what? That Levenson, Schwartz, and Kaufmann ——

Q. Or Kaufmann might tend to implicate him?

A. No. I don't understand it that way.

Q. Well, didn't he tell you that?

A. No, I don't think that is exactly what he said.

Q. Well, now, I will read you his answer. You asked him this question:

"Q. Then why any hesitancy concerning testimony of acts you made for Levinson or Schwartz or Kaufmann or whoever you were making them for?"

Now, he answered then—this is his exact answer ——

"A. Because, as I said before, they might tend to implicate me, and not having received any monies from this, I don't care to answer any questions that may tend to im-

plicate me, not knowing the law and not being represented by a lawyer at this time."

Are you satisfied that is his answer?

(531) A. That is his answer, but I don't take the inference out of it that you do. I am asking the questions and he answers there.

Q. All right, I will leave it for the jury as to that. Now, you did ask him whether he wanted a lawyer, whether he wanted to be represented?

A. Yes.

Q. And he told you then he didn't think it was necessary; is that correct?

A. Yes, sir.

Q. And then he signed this statement; am I right?

A. Yes, sir.

Q. And you had warned him that anything he said could be used against him?

A. Yes.

Q. That he doesn't have to sign, he doesn't have to answer anything, is that right, but, nevertheless, he did; am I right?

A. He did.

Q. Now, let us come back to the trial last time, two years ago. You were sitting there; am I right?

A. Here?

Q. Here.

A. Yes.

Q. You were also sitting there (indicating).

(532) A. Yes, sir.

Q. Now, when you were sitting here and you heard Mrs. Mandelbaum or Peggy Diamond, as she called herself, when she stated from the stand that he was introduced as Mr. Swidler, did you say anything? Was there any question of that fact at that time?

MR. LEES: What does that mean? I will object. I don't understand the question.

THE COURT: Sustained.

BY MR. KOSSMAN:

Q. When Mrs. Peggy Mandelbaum testified last time at the trial, do you remember she said at that time that Mr. Swidler was introduced to her as Mr. Swidler? Do you remember her saying that?

A. I read the testimony which says that.

Q. Even if you hadn't, I am asking your memory. Don't you remember she said that?

A. Yes.

Q. Did you question that statement that she made under oath at that time, two years ago?

A. Did I question it?

Q. Did the Assistant District Attorney question it?

A. Ask the Assistant District Attorney.

(533) Q. He is not here.

A. Well, I can't answer what he said.

Q. You know whether he questioned that statement or not. Did he say to her, "Mrs. Diamond, that is not a correct statement"?

A. You mean questioned the witness or questioned in his own mind?

Q. No, questioned the witness. I don't know what takes place in a man's mind unless he expresses it.

A. Neither do I. That is what I want to get straight.

Q. Did he question it when she said it then?

A. Well, counselor, I can't help on that. I really don't remember what he said. The questions that he put to the witness, I think the record will show. I don't recall exactly what they were. I think he did make an attempt, after she made that answer, to question her otherwise, to try to get a different answer. I think he may have.

Q. Well, on page 111—this is direct examination by the Assistant District Attorney. He asked Mrs. Mandelbaum:

"Q. Was he introduced to you by the name of Mr. Swidler or what?"

Her answer then was:

"By the name of Mr. Swidler, right."

The District Attorney then said:

(534) "Q. Continue. What happened up in the show room?"

And there was no attempt made at that time or any time prior to this trial to show that Mrs. Mandelbaum regarded Mr. Swidler as anybody but Mr. Swidler.

Now, does that clear that up in your mind?

A. Does what clear what up in my mind?

MR. LEES: I am going to object to these questions about Mrs. Mandelbaum's testimony at a prior trial, sir. He can answer here about this case.

MR. KOSSMAN: I have a right to ask the man who investigated the case, on his credibility and his memory, something that happened two years ago, whether he has testified about something that took place five years ago.

THE COURT: Oh, no, it doesn't reach that quality at all. You are questioning him what steps were taken by an official over whom he can't possibly exercise any control. I sustain the objection.

BY MR. KOSSMAN:

Q. Well, I will put it this way, then: Did you call the attention of the Assistant District Attorney at that time to the fact that Mrs. Mandelbaum was saying something that was incorrect? I ask you what you did.

A. I attempted to get the Assistant United States Attorney's (535) attention at that time, but I got no opportunity to talk to him because he was listening to the wit-

ness' testimony and he made motions to me to be quiet so he could hear.

Q. How about when she was being cross-examined and the Assistant District Attorney wasn't engaged in asking any questions? You had your opportunity then?

A. The same thing applied. When I attempted to get the attorney's attention, he was interested in the questions of the defense counsel and made motions to me not to interrupt him, not to bother him.

Q. Now, you heard Mrs. Mandelbaum testify that she did call that particular number but no one answered; am I right?

A. I think she gave two answers, that she attempted on a couple of occasions. Once she got somebody that said that Levenson wasn't there, and once something about the number didn't answer.

Q. The second time she testified he wasn't there. The first time she testified she called the number and got no answer; am I right?

A. I know there were two different answers she gave counsel. What the detail of them exactly ——

Q. I suggest to you this: Despite the effort that has been made in this case in just one or two items, one or two people out (536) of all the people, to show that he posed as Mr. Schwartz or Levenson or what not, I suggest to you that during the first trial the record shows conclusively, proves conclusively, that nobody then identified him or said that he pretended to be Schwartz or Levenson or anybody else; is that true?

MR. LEES: I object.

THE COURT: Sustained. I don't want any speeches. You have objected and I have sustained it. Now let us go on from there.

BY MR. KOSSMAN:

Q. Now I will ask you this question: Did you hear His Honor, the Judge, during that trial say, and I am reading exactly what was said:

"I think it is only fair to say that I have not heard anyone on this witness stand in this case who has said that this defendant ever represented his name to be other than his own. I think, in fairness to the defendant, that that is the testimony that is before you in this case. However, the testimony is all for you to consider, and that is purely a personal observation of the trial judge which is not binding on you."

MR. LEES: I object to that.

THE COURT: I made that observation in fairness (537) to the defendant. If you want another observation at the conclusion of this case about what has happened in this trial, I will also make it, but it won't be in fairness to the defendant.

BY MR. KOSSMAN:

Q. Well, now, there was no attempt at that time to take any exception to that remark, was there, that you are aware of?

All right, I will withdraw the last part of the question.

THE COURT: Mr. Kossman, nobody could take exception to that remark because I told—that is out of my charge, isn't it?

MR. KOSSMAN: Yes.

THE COURT: I was then speaking to the jury at the conclusion of the entire case, and certainly in that case and in this case and in every case, if there is any inference that

is favorable to a defendant, I will see that he gets the benefit of it.

BY MR. KOSSMAN:

Q. Now, you interviewed Mr. Cohen, didn't you?
A. Yes, sir.
Q. Am I right?
A. You mean Samuel Cohen of Bridgeport Luggage?
Q. When was the first time you interviewed Mr. Cohen?
(538) A. I couldn't answer that without quite some thought, counselor.
Q. Well, when you came to see Mr. Cohen you knew the goods had been shipped from the Bridgeport Luggage; is that correct?
A. Yes, sir.
Q. Is that right?
A. When I first came to see Mr. Cohen?
Q. Yes.
A. Yes, sir. You mean at the Bridgeport Luggage?

THE COURT: Read the question so I can understand and follow: Read them both. I would like to follow the continuity of it, the previous question, the answer, and then the succeding part.

(The last three questions and answers were read by the reporter.)

THE COURT: Start all over. That doesn't make any sense.

BY MR. KOSSMAN:

Q. You went to see Mr. Cohen; is that correct?
A. At the Bridgeport Luggage Company.

Q. Yes.

A. Yes, sir.

Q. Mr. Cohen told you he made no profits out of these (539) transactions; is that correct?

A. That is correct.

Q. And he told you that the Bridgeport Luggage Company made no profit out of any of these transactions that we have discussed; is that correct?

A. That is correct.

Q. You went to see Mr. Bassen and Mr. Brodsky in New York?

A. Yes, sir.

Q. And they told you they made no profits; is that correct?

A. Profit out of what?

Q. Out of these transactions.

A. They were not asked a question like that and they didn't answer a question like that. They told me that they permitted the storage of merchandise, otherwise, a drop in New York of merchandise from the Pacific Mills, to be stored in their place. Mr. Brodsky said that it became a nuisance, and then he called on his nephew to intercede with him to have the merchandise dropped at his premises, and that happened, and he no longer had the nuisance value of the merchandise coming into his place of business.

Q. Did you investigate Mr. Cohen's persoal bank account?

A. I personally?

Q. Yes.

(540) A. I didn't have that assignment.

Q. I beg your pardon?

A. Oh, you mean his personal bank account?

Q. Yes.

A. Well, let me say this, not quite in that manner, but I did have a schedule shown to me by another agent who had examined Mr. Cohen's personal bank account.

Q. You yourself didn't personally examine it; is that correct?

A. I personally didn't examine Mr. Cohen's income tax liability.

Q. Do you know whether in your investigation of Mr. Cohen you discovered whether he had any vaults or not?

A. Any what?

Q. Vaults, bank vaults.

A. I don't know whether he did or not.

Q. Your answer is you don't know whether he had or whether he didn't have?

A. Unless I am working on the income tax investigation myself, I am not informed.

Q. Oh, I see. You were not investigating the income tax liability of Cohen?

A. No, sir, I was assigned to somebody else, if there were one.

Q. Now, Mr. Cohen at that time told you that he did all this (541) because he was a friend of Mr. Swidler?

A. Yes. I think he said that they were friends from school days.

Q. And that is why he did it, is that correct, all these transactions?

A. Well, I can't say that he said that is why. He didn't say that is why he did it. He said that he knew Mr. Swidler for a great number of years and he did it through friendship.

Q. But he made no money out of it? That you are positive he said?

A. Oh, yes, he told me he made no money out of it.

Q. Would you know whether Mr. Cohen had about $90,000 in his bank account, from the other agent, at that time—personal bank account?

A. I would have no knowledge.

Q. By the way, you also spoke to Gilbert; am I right?

A. Interviewed Mr. Gilbert?

Q. Yes.

A. Yes, sir.

Q. You heard Mr. Gilbert at the first trial say that he only saw Mr. Swidler twice; is that correct?

A. I think that is correct.

Q. You heard him say at the second trial that it was six or (542) eight times or something like that; is that correct?

A. Well, as I recall it, he and you were in an altercation of some kind, and he gave you some answer like two, four, six, or eight or something like that. That is the best of my recollection. He didn't give any specific number.

THE COURT: What has that to do with this witness? What is the relevancy of asking that question?

BY MR. KOSSMAN:

Q. When Mr. Gilbert first stated in court under oath in your presence that he was there twice, that he only saw Mr. Swidler twice, did you at that time try to communicate to the Assistant District Attorney that that was not a correct statement, or did you recognize, when he made that statement under oath, that it was the truth?

A. I had before me, like now, copies of the statements that they made to me in the field, and I exposed that and pushed it over for the District Attorney to see when the witness was on the stand. Now, what Mr. Bowen's cognizance was of that I can't answer. Mr. Bowen will have to answer that.

Q. All right, that is your answer. I just have another question or two. This morning you were asked this question:

"Q. Did you ask Swidler if he ever sold any goods to Bader-Diamond?"

And your answer today was:

(543) "No, sir, I did not. I did not."

Is that correct?

A. I am saying that I did not ask him a question.

Q. You were asked the question this morning by the

Assistant District Attorney—well, I will give you the previous question:

"Q. Did you ask him if he knew Peggy Diamond, Bader-Diamond?"

You answered:

"I did."

You were then asked:

"What did he say about that?"

Your answer was that he had said he didn't recall.

Is that correct?

A. I think that is correct.

Q. It was that one transaction with Mrs. Peggy Diamond. The question this morning was:

"Q. He didn't recall what?

"A. I asked him if he knew Peggy Diamond, and he said he didn't recall. I said 'Peggy Diamond of the Bader-Diamond Company in New York.' He didn't recall."

Then you were asked this question by the Assistant District Attorney:

"Q. Well, did you ask him if he had sold any (544) goods to Bader-Diamond?"

And you said then:

"No, sir, I did not. I did not."

Is that correct?

A. Is what correct?

Q. That you never asked him if he had sold goods to Bader-Diamond.

(No answer.)

Q. Well, that is what you testified to this morning.

A. I distinctly recall that I asked him if he knew Miss Diamond of Bader-Diamond, but I don't recall whether I asked him as a question in the statement following that, as to whether he sold her merchandise or not.

Q. You did this morning. You were asked this question, whether you ever asked him, and you replied you did not.

A. That may be, but I feel that my memory has been refreshed, counselor, with your going over that statement,

and I might be able to answer a little better now than I was this morning.

Q. Do you mean to say that when you testified this morning you were not sure of what you were testifying?

A. Oh, I was trying to give you the most truthful answer I could, but now that you have vivified my memory going over that statement, I took in 1949, I seem to think that I may have asked (545) the taxpayer if he had ever sold merchandise to Bader-Diamond or to Peggy Diamond. I may have, but I may have answered contrary to that this morning, yes, sir.

Q. I am only referring you to the way you answered this morning. That is all I can go by. I mean you said this morning that ——

THE COURT: What is the question?

MR. KOSSMAN: The question was ——

THE COURT: What is the question, not what was the question. What is your question now to this witness?

BY MR. KOSSMAN:

Q. The question is now, isn't it a fact that in answer to the question by the Assistant District Attorney whether you had asked Swidler if he had ever sold any goods to Bader-Diamond, you replied, "No, sir, I did not. I did not."

Isn't that the way you answered this morning?

A. It is a little confusing the way you are asking me, but if you mean on direct examination this morning that I said that I had failed to ask Mr. Swidler in the 1949 interrogation as to whether he sold merchandise to Peggy Diamond, I may have answered that this morning, that I did not ask him.

MR. KOSSMAN: I have no more questions.

THE COURT: We will recess, members of the jury.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 70

DAVID SWIDLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court did not write an opinion. The *per curiam* opinion of the Court of Appeals (Pet. 27-28) is reported at 220 F. 2d 351.

JURISDICTION

The judgment of the Court of Appeals was filed March 22, 1955. (Pet. 28-29.) A petition for rehearing was denied on April 15, 1955. (Pet. 30.) The petition for a writ of certiorari was filed on May 12, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the conviction.

2. Whether the trial court correctly charged the jury concerning the theory of the case.

3. Whether rulings, comments and conduct of the trial court deprived petitioner of a fair trial.

STATUTE INVOLVED

INTERNAL REVENUE CODE OF 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

STATEMENT

On March 6, 1952 (R. 1a)[1], an indictment was filed in the United States District Court for the Eastern District of Pennsylvania charging petitioner with willful attempted evasion of his income taxes for the calendar year 1945, in violation of Section 145(b) of the Internal Revenue Code of 1939. The single count of the indictment alleged that petitioner had filed a fraudulent income tax return stating that his net income was $4,601.47 and that the tax due was $765.36, whereas, as he knew, his net income was $110,516.01 and the tax due thereon was $78,199.73. (R. 2a.) At the conclusion of a second trial, the jury returned a verdict of guilty (R. 206a), and, on October 15, 1954 (R. 1a), petitioner was sentenced to ten months' imprisonment and a fine of $5,000.[2]

The evidence in support of the verdict may be summarized as follows:

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[1] In the Court of Appeals, both petitioner and the Government filed printed appendices containing portions of the reporter's transcript of the trial proceedings. The petitioner's appendix is composed of his main appendix and an "Additional Appendix for Appellant", which adopts and continues the pagination of his main appendix. Record references to the petitioner's appendix will be indicated "R.—a.". References to the Government's appendix will be indicated "R.—b".

[2] Petitioner was first tried and convicted on June 3, 1952. The trial court denied petitioner's motion for judgment of acquittal but granted his alternative motion for a new trial on December 4, 1952. (R. 1a.) The Court of Appeals dismissed petitioner's appeal from the order denying his motion for judgment of acquittal for want of jurisdiction. *United States* v. *Swidler*, 207 F. 2d 47 (C.A. 3d), certiorari denied, 346 U. S. 915.

During the taxable year 1945, petitioner was engaged with other partners in the manufacture and sale of maternity clothes under the trade name, "Mother Craft". (R. 63a, 170a). Petitioner's distributive share of the income of the partnership was reported on his individual 1945 tax return. (R. 109a.)

Quite apart from the business of the "Mother Craft" partnership, petitioner was engaged in the purchase and sale of piece goods in an individual capacity. (R. 5a, 87a; R. 10b, 15b, 21b.) He purchased these goods through one Samuel M. Cohen, a luggage manufacturer who was able to secure piece goods because he had a Government priority. (R. 5a; R. 1b.) The luggage manufacturer had originally ordered the goods for his own use and found them unsatisfactory, but continued to order them at petitioner's request. (R. 4a.) Cohen paid for these goods with money received from petitioner (R. 15a), and Cohen made no profit on the transactions (R. 41a). When goods were delivered to Cohen, petitioner took charge of them and directed their reconsignment to vendees, using the name "J. Levenson, 105 W. 40th Street, New York City", as the consignor. (R. 7a, 9a-11a, 19a, 58a.) Cohen's foreman, who handled the shipping of the goods, testified that petitioner was introduced to him as "Levenson". (R. 65a.) Some of the vendees who purchased these materials also knew petitioner as "Levenson". Petitioner was introduced to Milton Simon as Levenson (R. 3b), and Simon introduced him to another purchaser as

Levenson (R. 21b). The invoices for the materials in question bore the name "J. Levenson, broker, cotton and rayon piece goods, 105 West 40th Street" (R. 15b, 23b; R. 129a), or the name, "Charles Schwartz, 40 Worth Street, New York, New York" (R. 136a).

Although checks in payment of the merchandise were generally made out to Schwartz or Levenson, they were tendered to petitioner personally. (R. 18b, 34b.) One check was drawn to petitioner, was endorsed by him and his wife, and was deposited to their personal, joint bank account. (R. 129a, 161a.)

Petitioner personally made adjustments on sales of cloth which proved unsatisfactory (R. 26b), and on one occasion refunded the purchase price in cash (R. 8b). He also made price adjustments. (R. 19b.) When one of petitioner's customers found that she was unable to use cloth purchased from petitioner, she unsuccessfully attempted to contact "Levenson" at the telephone number shown on the invoice. (R. 24b, 26b.) However, after payment on the check was stopped, petitioner appeared. (R. 25b.) He assumed full responsibility and later found a buyer for the material. (R. 25b-26b.)

The names Levenson and Schwartz were unknown at the addresses shown for them on the invoices (R. 28b, 30b, 32b), and no such names were found in the 1945 Manhattan telephone directory at the addresses or with the telephone numbers indicated (R. 24b, 26b-27b, 36b-39b). A Treasury

Department agent searched in vain for the named individuals. (R. 188a-189a.)

Checks drawn payable to Levenson or Schwartz were cashed at check-cashing concerns in New York City. (R. 39b-43b; R. 150a.) The manager of one of these check-cashing services, Charlotte Mintz, thought that petitioner was Charles Schwartz because she was informed, in advance of petitioner's first appearance, that a man named Charles Schwartz was coming in to present a check for cashing. (R. 151a, 157a.) When cashing Schwartz or Levenson checks, petitioner was always accompanied by one or two other men. One of these men, petitioner introduced as Levenson. (R. 152a-153a.) The checks, which were already endorsed when presented, were handed to the cashier by petitioner. (R. 151a.) Mrs. Mintz, when asked to whom the cash was paid over, testified, "Well, it was my usual practice to count out the cash before them and simply put it down. I would say that Mr. Swidler took the money, handed it to the other gentleman. I am not absolutely sure of who took it all the time. I wouldn't attempt to say." (R. 158a.) In a few instances, petitioner was not present when Levenson and Schwartz checks were cashed. (R. 157a.) During the year in question, petitioner also cashed a few personal checks bearing his endorsement. (R. 157a, 159a.) However, Mrs. Mintz paid little attention to the endorsement because petitioner had been highly recommended to her by a person in whom she had confidence. (R. 159a-160a.)

During the course of the investigation of his income tax affairs, petitioner denied having any transactions with Cohen other than one involving a $7,500 loan (R. 48b); denied ever using the name Levenson or Schwartz (R. 49b); and denied ever cashing any checks at a check-cashing service in New York City or accompanying anyone else who cashed a check at any such place (R. 46b-47b). When asked specifically about the Mintz check-cashing service, he declined to answer the agent. (R. 47b.) Petitioner advised the Government agent that he purchased piece goods from a man by the name of Levenson and that he understood that Levenson was employed by Schwartz. (R. 170a.) Petitioner denied receiving any income from checks made payable to Levenson and Schwartz. (R. 177a.)

The total price paid by petitioner for piece goods which were traced to the ultimate purchasers amounted to $33,614.07; the amount paid petitioner by those who bought the goods from him totaled $107,927.08. (R. 169a.)

Treating all the checks, including these payable to "Levenson" and "Schwartz" as income to petitioner, the Government computed his true income from this source, for 1945, to be $74,313.01. (R. 190a-191a.) His return for that year showed a net income of only $5,101.47, derived from his "Mother Craft" partnership. (R. 109a, 191a.)

Petitioner's motion for a judgment of acquittal at the close of the Government's evidence was overruled. (R. 193a-194a.) The defense then rested

without offering any evidence, and the jury returned a verdict of guilty. (R. 206a.)

ARGUMENT

1. Petitioner contends that the conviction is not supported by the evidence, urging (a) that the testimony indicates that the cash received by petitioner was turned over to someone else, and (b) that the evidence shows expenditures by petitioner in excess of gross receipts.

However, from the evidence outlined in the Statement, *supra,* it appears that the jury was fully warranted in returning its verdict of guilty. That the income from the checks drawn to Levenson and Schwartz represented income to petitioner can be inferred from page after page of the record. The jury's rejection of the improbable theory that petitioner acted only as a conduit was clearly in accord with the evidence.

Petitioner's second attack on the sufficiency of the Government's evidence (Pet. 12-14) assumes, *arguendo,* that he received and retained the proceeds of the checks in question. The suggestion is that the evidence shows expenditures by petitioner exceeding receipts by $22,000.

The argument has no foundation. The Government's case was based on particular transactions. It was able to trace the flow of the merchandise involved from the mills through petitioner to the ultimate purchasers. (R. 172a.) As to these transactions, a profit of $74,313.01 was realized on goods purchased for $33,614.07.

Petitioner, in stating that he purchased $130,000 worth of goods from the mills through Cohen (Pet. 12), actually becomes more deeply incriminated, for, if he sold the additional goods at the same profit as the others, his taxable income would reach a far higher figure. If, on the other hand, petitioner did not sell these other goods, they would represent an increase in inventory and would not decrease the net income otherwise established. The argument that the cost of additional purchases must be offset against the income on the transactions proved by the Government can be based only on the unlikely hypothesis that a complete loss was suffered on those purchases. Petitioner's statement (Pet. 13) that it was "incumbent on the Government to adduce further positive evidence as to what happened to the goods that were not sold, or if sold, who received the cash proceeds of those sales" is directly contrary to the well settled principle that the Government, once it establishes unreported income, need not prove a complete debit and credit account and need not prove the negative proposition that no offsetting losses were incurred. *United States* v. *Bender,* 218 F.2d 869 (C.A. 7th), certiorari denied, 349 U.S. 920; *United States* v. *Stayback,* 212 F.2d 313 (C.A. 3d), certiorari denied, 348 U.S. 911; *United States* v. *Hornstein,* 176 F.2d 217 (C.A. 7th).

Petitioner errs, moreover, in stating (Pet. 13) that the Government's approach was to "atomize" his business transactions by treating component

steps in an integral transaction separately. All of the transactions with which the evidence dealt were complete, the materials involved being traced from their purchase by petitioner to their purchase by the ultimate vendees. The proof of these transactions and the surrounding events overwhelmingly showed that petitioner received very substantial income for which he failed to account and that he took elaborate steps which can be explained only as an attempt at concealment.

2. Petitioner's contention that the District Court erred in failing to charge adequately as to the defense's theory of the case is without substance. The theory, as stated in the petition (Pet. 15), is that petitioner "had sold goods not for himself but on behalf of others; that his reason for doing this was to obtain merchandise for his own small business; that the profits from the transactions were not kept by him, but were turned over to other people." At the trial, defendant raised this point when he asked the court to charge (R. 205(a)):

> If Samuel Cohen and/or other individuals made money from the sales of the merchandise mentioned in this case and did not pay their income taxes, but the defendant did not personally attempt to evade a substantial amount of his own income tax, your verdict must be not guilty.

The court read this request to the jury and gave it explicit approval (*ibid.*). Petitioner requested no further instruction on his theory of the case as he,

indeed, concedes in his petition (Pet. 16-17). The court was scarcely obliged to seek a formulation of petitioner's theory more elaborate than that suggested by petitioner's counsel.[3]

3. Petitioner alleges a number of other errors which he claims had the effect of denying him a fair trial: that the trial judge asked improper questions of two Government witnesses (Pet. 17-20); that the trial judge made an improper comment reflecting on the credibility of certain witnesses (Pet. 21); that the court unduly restricted the right to cross-examine a Government witness (Cohen) by sustaining an objection to a question (Pet. 22); and that the court prejudiced petitioner by interrupting the summation of his counsel (Pet. 22-25).

These specifications were considered by the Court of Appeals which found (Pet. 28) that "the trial court's comments, rulings and charge did not deprive [petitioner] of a fair trial." While it is unnecessary to deal with these contentions at any length, we note (1) that the questions put by the court to the two Government witnesses (see R. 148a-149a) were perfectly proper questions designed to clarify the issues; (2) that the comment to which petitioner takes exception (see R. 186a) was a justified rebuke to defense counsel for attempting to put before the jury the court's instructions during the previous trial, and that it did not relate to the credibility of any witness; (3)

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[3] Cf. *Isaacs* v. *United States*, 159 U. S. 487; *Gicinto* v. *United States*, 212 F. 2d 8 (C.A. 8th), certiorari denied, 348 U. S. 884; *Stassi* v. *United States*, 50 F. 2d 526 (C.A. 8th).

that the court's limitation upon the cross-examination of Cohen was well within its discretion, *United States* v. *Stoehr*, 196 F. 2d 276 (C.A. 3d); and (4) that the court's interruption of the closing statement of petitioner's counsel, made in order to correct what appeared to the court to be a misstatement of fact (see R. 195a-197a), can scarcely be considered error in view of the broad discretion vested in trial judges in supervising arguments of counsel. *United States* v. *Ward*, 96 F. 2d 189 (C.A. 5th); *Mannix* v. *United States*, 140 F. 2d 250 (C.A. 4th).

CONCLUSION

The decision of the court below is clearly correct, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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